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ABSTRACT

This document presents proceedings of hearings held before a congressional committee on H.R. 1, the Civil Rights Act of 1991. In addition to the text of H.R. 1, the live statements and prepared statements of the following individuals and groups are included: Brenda Berkman; John Bishop; Dr. Heidi Hartmann; Kenneth Kimerling; Jacqueline Morris; Kellis Parker; American Bar Association; American Psychological Association; Associated General Contractors of America; Beverly Hall Burns; Mark Dichter; Rep. Julian Dixon; Nancy O'Mara Ezold; Zachary Fasman; Rep. William Goodling; Rep. Steve Gunderson; Pamela Hemminger; Rep. William Jefferson; Loria Kelman; Freada Klein; Lawyer's Committee for Civil Rights Under Law; Leadership Conference on Civil Rights; National Council of La Raza; National Foundation for the Study of Employment Policy; National Women's Law Center; NOW Legal Defense and Education Fund; People for the American Way; Pamela Perry; Progressive Policy Institute; Rep. John Reed; Lois Robinson; David Rose; Susan Deller Ross; Benjamin Schneider; U.S. Department of Justice, Civil Rights Division; U.S. Equal Opportunity Commission; Joan C. Welsh; and Women's Legal Defense Fund. (DB)

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HEARINGS ON H.R. 1, THE CIVIL RIGHTS ACT OF 1991

HEARINGS

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

HEARINGS HELD IN WASHINGTON, DC, FEBRUARY 27 AND MARCH 5, 1991

Serial No. 102–2

Printed for the use of the Committee on Education and Labor

SO 022 061

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HEARING ON H.R. 1, THE CIVIL RIGHTS ACT OF 1991

WEDNESDAY, FEBRUARY 27, 1991

House of Representatives,
Committee on Education and Labor,
Washington, DC.

The committee met, pursuant to notice, at 9:45 a.m., in Room 2175, Rayburn House Office Building, Hon. William D. Ford [Chairman] presiding.

Members present: Representatives Ford, Gaydos, Clay, Miller, Murphy, Kildee, Williams, Martinez, Owens, Hayes, Perkins, Sawyer, Payne, Lowey, Unsoeld, Washington, Serrano, Mink, Andrews, Jefferson, Reed, Roemer, de Lugo, Fuster, Goodling, Coleman, Petri, Roukema, Gunderson, Bartlett, Armey, Fawell, Henry, Ballenger, Molinari, Barrett, Boehner, and Klug.

Staff present: Reginald C. Govan, counsel; Gregory Watchman, associate counsel; and Randel Johnson, minority labor counsel; Dottie Strunk, labor coordinator; Kathy Gillespie, professional staff member; and Tracy Hatch, professional staff member.

[The text of H.R. 1 follows:]

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102d CONGRESS
1st Session

H. R. 1

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

January 3, 1991

Mr. Brooks (for himself and Mr. Edwards of California, Mr. Fish, Mr. Gephardt, Mr. Gray, Mr. Hoyer, Mr. Fazio, Ms. Schroeder, Ms. Snowe, Mr. Towns, Mr. Ortiz, Mr. Mineta, and Mr. Matsui) introduced the following bill; which was referred jointly to the Committees on Education and Labor and the Judiciary

---

A BILL

To amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) in a series of recent decisions addressing employment discrimination claims under Federal law, the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protections; and

(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.

(b) PURPOSES.—The purposes of this Act are to—

(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

SEC. 3. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end thereof the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'group of employment practices' means a combination of employment practices that produces one or more decisions with respect to employment, employment referral, or admission to a labor organization, apprenticeship or other training or retraining program.

"(o)(1) The term 'required by business necessity' means—

"(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labor organization), the practice or group of practices must bear a significant relationship to successful performance of the job; or

"(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

"(2) In deciding whether the standards in paragraph (1) for business necessity have been met, unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required. The defendant may offer as evidence statistical reports, validation studies, expert testimony, prior successful experience and other evidence as permitted by the Federal Rules of Evidence, and the court shall give such weight, if any, to such evidence as is appropriate.

"(3) This subsection is meant to codify the meaning of 'business necessity' as used in *Griggs v. Duke Power Co.* (401 U.S. 424 (1971)) and to overrule the treatment of business necessity as a defense in *Wards Cove Packing Co., Inc. v. Atonio* (109 S. Ct. 2115 (1989)).

"(p) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs, or those Federal entities subject to the provisions of section 717 (or the heads thereof).".

SEC. 4. RESTORING THE BURDEN OF PROOF IN DISPARATE IMPACT CASES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) is amended by adding at the end thereof the following new subsection:

"(k) PROOF OF UNLAWFUL EMPLOYMENT PRACTICES IN DISPARATE IMPACT CASES.—(1) An unlawful employment practice based on disparate impact is established under this section when—

"(A) a complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such practice is required by business necessity; or

"(B) a complaining party demonstrates that a group of employment practices results in a disparate impact on the basis of race, color, religion, sex, or national origin, and the respondent fails to demonstrate that such group of employment practices is required by business necessity, except that—

"(i) except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party shall not be required to demonstrate which specific practice or practices within the group results in such disparate impact;

"(ii) if the respondent demonstrates that a specific employment practice within such group of employment practices does not contribute to the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity; and

"(iii) if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact—

"(I) the complaining party shall be required to demonstrate which specific practice or practices contributed to the disparate impact; and

"(II) the respondent shall be required to demonstrate business necessity only as to the specific practice or practices demonstrated by the complaining party to have contributed to the disparate impact;

except that an employment practice or group of employment practices demonstrated to be required by business necessity shall be unlawful where a complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the respondent as well.

"(2) A demonstration that an employment practice is required by business necessity may be used as a defense only against a claim under this subsection.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses an illegal drug as defined in

Schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of the race, color, religion, sex, or national origin.

"(4) The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.".

SEC. 5. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.

(a) IN GENERAL.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 4) is further amended by adding at the end thereof the following new subsection:

"(l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE CONTRIBUTING FACTOR.—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a contributing factor for any employment practice, even though other factors also contributed to such practice.".

(b) ENFORCEMENT PROVISIONS.—Section 706(g) of such Act (42 U.S.C. 2000e–5(g)) is amended by inserting before the period in the last sentence the following: "or, in a case where a violation is established under section 703(l), if the respondent establishes that it would have taken the same action in the absence of any discrimination. In any case in which a violation is established under section 703(l), damages may be awarded only for injury that is attributable to the unlawful employment practice".

SEC. 6. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2) (as amended by sections 4 and 5) is further amended by adding at the end thereof the following new subsection:

"(m) FINALITY OF LITIGATED OR CONSENT JUDGMENTS OR ORDERS.—(1) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order resolving a claim of employment discrimination under the United States Constitution or Federal civil rights laws may not be challenged in a claim under the United States Constitution or Federal civil rights laws—

"(A) by a person who, prior to the entry of such judgment or order, had—

"(i) actual notice from any source of the proposed judgment or order sufficient to apprise such person that such judgment or order might affect the interests of such person and that an opportunity was available to present objections to such judgment or order; and

"(ii) a reasonable opportunity to present objections to such judgment or order;

"(B) by a person with respect to whom the requirements of subparagraph (A) are not satisfied, if the court determines that the interests of such person were adequately represented by another person who challenged such judgment or order prior to or after the entry of such judgment or order; or

"(C) if the court that entered the judgment or order determines that reasonable efforts were made to provide notice to interested persons.

A determination under subparagraph (C) shall be made prior to the entry of the judgment or order, except that if the judgment or order was entered prior to the date of the enactment of this subsection, the determination may be made at any reasonable time.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which they intervened;

"(B) apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the United States Constitution.

"(3) Any action, not precluded under this subsection, that challenges an employment practice that implements and is within the scope of a litigated or consent judgment or order of the type referred to in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 7. STATUTE OF LIMITATIONS; APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.

(a) STATUTE OF LIMITATIONS.—Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by striking out "one hundred and eighty days" and inserting in lieu thereof "2 years";

(2) by inserting after "occurred" the first time it appears "or has been applied to affect adversely the person aggrieved, whichever is later,";

(3) by striking out ", except that in" and inserting in lieu thereof ". In"; and

(4) by striking out "such charge shall be filed" and all that follows through "whichever is earlier, and".

(b) APPLICATION TO CHALLENGES TO SENIORITY SYSTEMS.—Section 703(h) of such Act (42 U.S.C. 2000e-2) is amended by inserting after the first sentence the following new sentence: "Where a seniority system or seniority practice is part of a collective bargaining agreement and such system or practice was included in such agreement with the intent to discriminate on the basis of race, color, religion, sex, or national origin, the application of such system or practice during the period that such collective bargaining agreement is in effect shall be an unlawful employment practice.".

SEC. 8. PROVIDING FOR DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g)) is amended by inserting before the last sentence the following new sentences: "With respect to an unlawful employment practice (other than an unlawful employment practice established in accordance with section 703(k)) or in the case of an unlawful employment practice under the Americans with Disabilities Act of 1990 (other than an unlawful employment practice established in accordance with paragraph (3)(A) or paragraph (6) of section 102 of that Act) as it relates to standards and criteria that tend to screen out individuals with disabilities)—

"(A) compensatory damages may be awarded; and

"(B) if the respondent (other than a government, government agency, or a political subdivision) engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded against such respondent;

in addition to the relief authorized by the preceding sentences of this subsection, except that compensatory damages shall not include backpay or any interest thereon. Compensatory and punitive damages and jury trials shall be available only for claims of intentional discrimination. If compensatory or punitive damages are sought with respect to a claim of intentional discrimination arising under this title, any party may demand a trial by jury.".

SEC. 9. CLARIFYING ATTORNEY'S FEES PROVISION.

Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended—

(1) by inserting "(1)" after "(k)";

(2) by inserting "(including expert fees and other litigation expenses) and" after "attorney's fee,";

(3) by striking out "as part of the"; and

(4) by adding at the end thereof the following:

"(2) No consent order or judgment settling a claim under this title shall be entered, and no stipulation of dismissal of a claim under this title shall be effective, unless the parties or their counsel attest to the court that a waiver of all or substantially all attorney's fees was not compelled as a condition of the settlement.

"(3) In any action or proceeding in which any judgment or order granting relief under this title is challenged, the court, in its discretion and in order to promote fairness, may allow the prevailing party in the original action (other than the Commission or the United States) to recover from either an unsuccessful party challenging such relief or a party against whom relief was granted in the original action or from more than one such party under an equitable allocation determined by the court, a reasonable attorney's fee (including expert fees and other litigation expenses) and costs reasonably incurred in defending (as a party, intervenor or otherwise) such judgment or order. In determining whether to allow recovery of fees from the party challenging the initial judgment or order, the court should consider not only whether such challenge was unsuccessful, but also whether the award of fees against the challenging party promotes fairness, taking into consideration such factors as the reasonableness of the challenging party's legal and factual position and whether other special circumstances make an award unjust.".

SEC. 10. PROVIDING FOR INTEREST, AND EXTENDING THE STATUTE OF LIMITATIONS, IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking out "thirty days" and inserting in lieu thereof "ninety days"; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in

payment shall be available as in cases involving non-public parties, except that prejudgment interest may not be awarded on compensatory damages".

SEC. 11. CONSTRUCTION.

Title XI of the Civil Rights Act of 1964 (42 U.S.C. 2000h et seq.) is amended by adding at the end thereof the following new section:

"SEC. 1107. RULES OF CONSTRUCTION FOR CIVIL RIGHTS LAWS.

"(a) Effectuation of Purpose.—All Federal laws protecting the civil rights of persons shall be interpreted consistent with the intent of such laws, and shall be broadly construed to effectuate the purpose of such laws to provide equal opportunity and provide effective remedies.

"(b) Nonlimitation.—Except as expressly provided, no Federal law protecting the civil rights of persons shall be construed to repeal or amend by implication any other Federal law protecting such civil rights.

"(c) Interpretation.—In interpreting Federal civil rights laws, including laws protecting against discrimination on the basis of race, color, national origin, sex, religion, age, and disability, courts and administrative agencies shall not rely on the amendments made by the Civil Rights Act of 1990 as a basis for limiting the theories of liability, rights, and remedies available under civil rights laws not expressly amended by such Act.".

SEC. 12. RESTORING PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes of the United States (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end thereof the following new subsections:

"(b) For purposes of this section, the right to 'make and enforce contracts' shall include the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination as well as against impairment under color of State law.".

SEC. 13. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this Act shall be construed to require or encourage an employer to adopt hiring or promotion quotas on the basis of race, color, religion, sex or national origin: *Provided, however*, That nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

SEC. 14. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

(a) APPLICATION OF AMENDMENTS.—The amendments made by—

(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989;

(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989;

(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989;

(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8, 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

(5) section 7(a)(2) shall apply to all proceedings pending on or commenced after June 12, 1989; and

(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989.

(b) Transition Rules.—

(1) In general.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

(2) Section 6.—Any orders entered between June 12, 1989 and the date of enactment of this Act, that permit a challenge to an employment practice that implements a litigated or consent judgment or order and that is inconsistent with the amendment made by section 6, shall be vacated if, not later than 6 months after the date of enactment of this Act, a request for such relief is made. For the 1-year period beginning on the date of enactment of this Act, an individual whose challenge to an employment practice that implements a litigated or consent judgment or order is denied under the amendment made by section 6, or whose order or relief obtained under such challenge is vacated under

such section, shall have the same right of intervention in the case in which the challenged litigated or consent judgment or order was entered as that individual had on June 12, 1989.

(c) PERIOD OF LIMITATIONS.—The period of limitations for the filing of a claim or charge shall be tolled from the applicable effective date described in subsection (a) until the date of enactment of this Act, on a showing that the claim or charge was not filed because of a rule or decision altered by the amendments made by sections 4, 5, 7(a)(2), or 12.

SEC. 16. CONGRESSIONAL COVERAGE.

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) is amended by adding at the end thereof the following new section:

"SEC. 719. CONGRESSIONAL COVERAGE.

"Notwithstanding any other provision of this title, the provisions of this title shall apply to the Congress of the United States, and the means for enforcing this title as such applies to each House of Congress shall be as determined by such House of Congress.".

SEC. 17. STATUTE OF LIMITATIONS; NOTICE OF RIGHT TO SUE.

(a) STATUTE OF LIMITATIONS.—Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended—

(1) in paragraph (1)—

(A) by striking out "180 days" and inserting in lieu thereof "2 years"; and

(B) by inserting "or has been applied to affect adversely the person aggrieved, whichever is later" after "occurred"; and

(2) in paragraph (2), by striking out "within 300 days" and all that follows through "whichever is earlier" and inserting in lieu thereof "a copy of such charge shall be filed by the Commission with the State agency".

(b) NOTICE OF RIGHT TO SUE.—Section 7(e) of such Act (29 U.S.C. 626(e)) is amended—

(1) by striking out paragraph (2);

(2) by striking out the paragraph designation in paragraph (1);

(3) by striking out "Sections 6 and" and inserting "Section"; and

(4) by adding at the end thereof the following: "If a charge filed with the Commission is dismissed by the Commission, the Commission shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought against the respondent named in the charge by a person defined in section 11 (29 U.S.C. 630).".

SEC. 18. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts amended by this Act.

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Chairman FORD. Good morning and welcome to the full committee hearing on one of the many issues that we will pursue this year in the hope of improving basic fairness and equity in the workplace for hardworking Americans.

Today's hearing marks my first as Chairman of this committee, but I am not a newcomer to the committee or to the issues before us. I have spent a number of years with both.

The cause we take up today is but one of many which the Committee on Education and Labor has championed in protecting the rights of American workers. Whether it is family and medical leave, child care, plant closing notification or a fair minimum wage, this committee has been at the forefront of efforts to help working families get ahead.

Today's deliberations are even more critical because of recent Supreme Court decisions which have weakened the safeguards against job discrimination. Equal opportunity is a basic American principle, and we should pass civil rights legislation in order to take a strong stand against discrimination in the workplace. Our past efforts have resulted in fairer treatment for not only minorities, but women, people with disabilities, older workers and others.

I think it is fair to say that today's hearing is not the start of a debate over a civil rights bill. We are together to fashion legislation to prevent bad employers from doing bad things to good hard-working employees.

Any American who is willing to work deserves legal protection against discriminatory treatment by employers who put corporate profits ahead of fairness. I hope all members of this committee share my goal of passing a bill which will offer a response to injustices and ensure fair treatment in the workplace to all workers.

At a time when thousands of American men and women are fighting in the front lines in the Persian Gulf, we must act to ensure that our returning troops are given the same equality of opportunity in the marketplace that they share on the battlefield in the Middle East.

We all abhor quotas. The legislation we are considering explicitly rejects quotas. Hiring pay and promotion decisions must be based on individual qualifications. I have lived my life sharing with most Americans a commitment to the basic principle that the opportunity to get ahead should be based on individual effort and merit. I will not yield in that commitment. The fruits of our labor on H.R. 1 must sustain that fundamental common sense view.

Current civil rights laws permit the recovery of unlimited compensatory and punitive damages in cases of intentional race discrimination. Yet probably few Americans are aware that no similar remedy exists in cases of intentional gender discrimination.

Plaintiffs in sex discrimination cases are limited to injunctions, reinstatement and back pay. Those plaintiffs may not be compensated under Federal law for humiliation, pain and suffering, psychological harm and related medical expenses no matter how egregious the circumstances of their case.

In keeping with our focus of equal pay for equal work, equal opportunity in employment decisions and equal protection of good, hard working employees from discrimination on the job, today's hearing will examine the effects of sex discrimination and harassment in the workplace.

Our principle focus will be on the lack of monetary relief for intentional sex discrimination under current law. We will also discuss barriers to the high level advancement of women and minorities in business, as well as the issue of pay equity for women and minorities.

I would at this time recognize any of the members of the committee who wish to make an opening statement before the beginning of this first hearing.

Mr. Gunderson. Mr. Chairman?

Chairman Ford. Mr. Gunderson.

Mr. Gunderson. First of all, thank you, Mr. Chairman, and I'd ask unanimous consent that a longer statement might simply be inserted in the record.

Chairman Ford. Without objection, so ordered.

Mr. Gunderson. But I would like to take the opportunity to follow up on, I think, your very fair opening remarks as we begin in this session of Congress a consideration of civil rights. I would hope that as this is a new Congress we can also have a new beginning in the debate over civil rights legislation.

Unfortunately and, I think, very frankly, it was much the focus of the other body and the administration where the debate occurred in the last session, perhaps with a new Chairman of this committee, with a new session, we in the House of Representatives can set politics aside on both sides and really try to craft a legislative solution and not a political issue in this Congress.

If we make that as our desire and we do it early in this session, I pledge myself and I think many on this side to work with you towards that particular effort. I, also, want to pay particular tribute to the focus of this hearing because, I think, you are dealing with, in my opinion, the most difficult issue in the civil rights debate over the last couple of years.

Whether we are going to make dramatic changes in the areas of the civil rights resolution in terms of damages really needs to be discussed, both from the perspective of how do we use them and in the perspective of how do we truly assist in the most expeditious manner ending the civil rights abuses in the workplace.

We ought not make in the name of civil rights a new law for full employment for plaintiff attorneys and, I think, everyone in this committee can agree with that as a goal. We ought to then use this hearing to find a better solution.

I look forward to working with you, Mr. Chairman, and thank you.

[The prepared statement of Hon. Steve Gunderson follows:]

Prepared Statement of Hon. Steve Gunderson, a Representative in Congress from the State of Wisconsin

Mr. Chairman, the issue which we will be discussing today is not a new one. This legislation was debated at length during the last Congress, both in committee and in the Congress as a whole, as well as in the press and in homes and in places of business across this country.

Despite this debate, I do not feel that the issues at the bottom of this legislation have been fully and openly explored. For that reason, I am pleased that we will be holding today's hearing—as well as the hearing next week.

Today's focus—the issue of damages—was hotly debated throughout last year's process. Unfortunately, the debate too often focused on charges of indifference to the plight of those harmed by discrimination and on what was the most appropriate dollar amount of an award—not on if damages are the only, or indeed the best, answer to discrimination.

The problem with this approach, with this debate, is that it ignores the supposed purpose of this legislation—to stop discrimination—which is a different objective than compensating victims of discrimination. The two may not be incompatible, but likewise they do not walk hand-in-hand.

There is an obvious allure to the damages issue for many people. The danger comes when that becomes the overriding concern, when we attempt to place a price tag on every bad thing which happens to a person—not just to prevent the bad thing from being repeated or from happening in the first place.

I hope that today's witnesses can bring some new perspective to this issue and can help us to determine just where the priorities of proponents of this legislation lie—and where the Congress's intentions *should* lie—stopping discrimination or focusing on money.

Chairman FORD. Are there any other members who wish to make a statement?

Mr. HAYES. Mr. Chairman, if I may?

Chairman FORD. Mr. Hayes.

Mr. HAYES. I, too, would like to thank you for convening this very important hearing. Your leadership and commitment in addressing the Civil Rights Act of 1991 is greatly appreciated and needed in seeing that this piece of legislation becomes law. I believe that the Civil Rights Act is one, if not the most important, pieces of legislation that will be addressed by the 102d Congress. It's important that we move this bill expeditiously without changes that will water down or significantly alter the bill. On Monday, President Bush spoke of welcoming the troops home with open arms. The best way to do that for the large number of women and minorities serving in the Persian Gulf is to work out a strong civil rights bill. This must be done so as to send an important signal that justice must not be denied; that this country will neither tolerate nor support employment discrimination; and that for the ethical, morale and economic well-being of this Nation, such discrimination must not be allowed.

Finally, I want to commend the five witnesses who will appear here this morning. I'm sure that we will all be enlightened by their comments and I appreciate their taking the time to assist us in a better understanding of the issues before us.

Thank you, Mr. Chairman.

Chairman FORD. Mr. Fawell?

Mr. FAWELL. Thank you, Mr. Chairman. I do applaud your comments. I hope that we can have some new understandings in reference to the Civil Rights Bill of 1991. As I understand the hearing today is basically in reference to the question of damages under House Bill 1, which for all practical purposes, however, is a copy of the Edwards bill of last year,as the Edwards bill left the Judiciary Committee, which means that, at least from my viewpoint, it wasn't as good a bill as we ultimately passed from the House and, of course, that bill was vetoed.

So, we may find ourselves a bit behind the 8-ball as we try to look at these matters objectively since views were relatively hardened last year in regard to the Edwards bill. I find it difficult to understand why the proponents of this legislation while holding out H.R. 1 as a bill to correct the effect of certain Supreme Court decisions in order to, as they see it, retain the character of Title VII of the 1964 Civil Rights Act have also proposed simultaneously to gut the remedy provisions of Title VII.

In lieu of the traditional remedies of Title VII of back pay and legal fees, equitable and conciliatory remedies, which I believe have served us well in regard to the Civil Rights Act for 25 years, and I recall Congressman Edwards stating that last year on the floor—we are proposing new remedies.

In regard to which there has been no questioned Supreme Court cases which would have to be repealed. H.R. 1 suggests that Title VII be turned into a general tort remedy complete with new two-year statute of limitations and unlimited compensatory and punitive damages, which is certainly new.

As such, it goes even further than the bill vetoed by President Bush in turning a place of employment labor statute and, I think, we have to remember that we're talking about a place of employment labor statute and turning it into, at least as the bill is now set forth, as the trial lawyers, plaintiff trial lawyers, absolute delight. H.R. 1 at this point gives us nothing new from what we had last year. It has one thing in its favor, a very pleasing name, the Civil Rights Act of 1991.

I hope, though, that all of us can, including this speaker, view it in a much more objective way and I felt last year that there was great potential for having a meaningful bill and I still think that is possible. I thank you.

Chairman FORD. Mrs. Mink?

Mrs. MINK. Thank you, Mr. Chairman. I'm delighted that the Committee on Education and Labor has decided to open up its deliberations on H.R. 1. It is the most significant piece of legislation, I believe, pending in the Congress, dealing with basic civil rights of people in this country.

I was fortunate enough to have served a few brief weeks in the 101st Congress and one of my biggest disappointments was to see the failure of the override of the veto of this legislation. It is a terribly important bill. The central purpose of it is clearly to merely restore the law originally written to safeguard and make equitable the application of all laws regarding civil rights in this country. The central issue today that we're discussing is the issue of remedies.

Mr. Chairman, there is absolutely no justification for a two-tiered system of remedies for discrimination victims. Yet that's exactly the situation under our current laws. It creates two separate and discrete classes of victims of intentional discrimination. It's important to be crystal clear on this point. H.R. 1 does not create damages remedy for disparate impact discrimination, but applies only to intentional discrimination, and that is what we are here today to hear and discuss, compensation that is rightfully due to victims of discrimination in our society.

Members of racial groups covered by Section 1981, a post-Civil Rights Bill, is interpreted to prohibit employment discrimination and is entitled to full compensatory and punitive damages. However, women, members of religious groups and national origin groups are not entitled to Section 1981 protections regardless of the mental, emotional and physical pain that people have suffered and endured because of discrimination. They are limited to wage related remedies.

Today we will hear powerful testimony from real victims of this discrimination that is practiced in all areas of employment. Women who have gone to court, won their cases, suffered unspeakable humiliation and degradation and yet because of the limitation of remedies under Title VII have been unable to recover compensation for their losses.

After nearly 20 years of experience under Title VII, it is fully appropriate, indeed long overdue, Mr. Chairman, that we reevaluate and reinstate common sense, common law concepts of equity in applying all of the laws with regard to discrimination in the workplace.

I look forward to a stimulating series of hearings in this committee and, more importantly, to the final enactment and correction of these inequities. Thank you, Mr. Chairman.

Mr. **Chairman Ford**. Mr. Henry?

Mr. **Henry**. Thank you, Mr. Chairman.

Mr. Chairman, I do want to join with others who commended you, first of all, for the tone you've set with your opening statement in consideration of this bill. I was among those who voted for passage of the final compromised bill and shared in the disappointment of its veto. My personal belief was that it was not a so-called quota bill.

But I do think that, as you have stated, if our purpose here is not to start a debate and raise a debate, but rather to fashion legislation, it's going to be very important for all of us on both sides of the issue to really struggle over the particulars and I think increasingly some of those who have looked at this from a distance, newspaper editors and columnists, and legal opinion, as they begin to look at it, realize we're talking about very narrow technical issues which, indeed, do have broad significance.

But I think it's going to be very, very important if we want to get this bill through that we honor the tone you've established in your opening remarks. I want to commend you for that because I would very much like to see legislation passed through. I must say I have a sense of personal disappointment on the procedure. I thought it might have been easier to start where we left off because at least then we knew what had to be resolved and to a certain extent by having a new proposal before us, it opens up new questions which will probably then open up new counter arguments, et al.

But the significance and the importance of this bill, both substantively and symbolically, reaches to the heart of the American ideal and it's appropriate that if given the number 1, H.R. 1, if you can pull this off, Mr. Chairman, and continue that kind of spirit, it will be a remarkable demonstration of leadership not only for this committee and this Congress, but for the Nation. Just for the way in which you've attempted to steer us, I give you my sincere appreciation.

Thank you.

Chairman **Ford**. Thank you, Mr. Henry.

Mr. Washington?

Mr. **Washington**. Thank you, Mr. Chairman. I, too, would like to commend you for the tone that you've set in the very beginning of our deliberations because I believe it gives us a parameter within which we can work not as Democrats and Republicans, but as women and men of good will, who have one purpose in mind.

I join my colleagues, Mr. Henry and Mr. Gunderson, whom I've come to appreciate from having worked with them on this legislation, together with many other members, of course, but I point them out, in particular, because I believe that their remarks this morning, I hope, will demonstrate that there is a more excellent way in which we can go about our business.

The only remarks that I really want to make this morning are not addressed to the legislation, but rather addressed to the members. It seems, to this person, that the more we take the opportunity to talk to each other and not at each other, the closer we will come to passing a bill that has very little or nothing to do with politics because the people outside the Beltway listen to what we say.

But at the same time, it seems to me, at least from my vantage point, that when things become politicized, it doesn't matter whether it's a Democrat or a Republican or what label people put on you, when we fail to accomplish a laudable goal that by and large the people of this Nation agree with, then we have not done our job.

So the less we use terms like "quota," and "engine of litigation," and "egregious on our side," and "trial lawyers' bonanza," it seems to me the closer we can come to toning down the rhetoric and talking about what the bill is. We don't need to label this bill. Everybody can read, write and understand the English language and everyone who can, can reach their own conclusion about the specific language of what the bill does and where the changes need to be made.

But it seems to me that the more we heighten the rhetoric by calling the bill these names, the farther the chasm becomes between us, and the less likely it will be that we'll be able to sit down at the table of sisterhood and brotherhood and be able to arrive at a bill that we can agree with. If someone keeps calling it a "lawyers' bonanza," well, first of all, that puts me in a defensive posture because I've been a lawyer for a long time, and I think that one of the highest callings that a person can have, quite frankly, is to be a lawyer.

When you take somebody else's case and you represent them, it doesn't matter whether you get paid or not, when they look you in the face and you have solved a problem for them that can make or break their lives, I'm not talking about Title VII cases, I defended persons charged with crime for the most part in my practice. There's very little money to be made for the average Joe Blow lawyer like myself trying these kinds of cases. I wasn't a personal injury lawyer, so I'm not here to defend them.

But the legal profession doesn't need a lashing from us. When we start doing it, you're going to put me and perhaps several others in the defensive posture and you're going to make it very difficult for us to talk about the merits of the bill. So, let's leave the name calling and the catcalling aside.

We can determine, intelligent people can decide, whether it's an "engine of litigation," whatever that means, because every time a plaintiff's lawyer makes a dollar, don't forget that the defense lawyer has probably made $5. I had a standing offer when I tried

Title VII cases. When I won one, I would be willing to take half for winning what the lawyer who defended the company got for losing, but they didn't want to open up their records and introduce that in court, of course.

The point I'm trying to make is this bill has very little to do with those kinds of labels. What it has to do with is a serious attempt by some to ameliorate a very real problem in our society. I doubt that there is one person within the sound of my voice who would not at least agree that there is a need to rectify several Supreme Court decisions and there's an inequity within the group of people who are discriminated against.

It's not fair for a black woman to have one remedy and for a white woman to have a different remedy. It seems to me, anybody who doesn't agree with that doesn't agree with civil rights at all. So, there are some areas in which we can agree. It seems to me that people of goodwill start from the areas where they can agree and resolve them and then work like Harris Fawell and I did for many, many sessions last year.

We couldn't reach an agreement. But I don't think that either he or I or anyone who was present would agree that we didn't do all that we could to try to reach an agreement. It occurs to me, Harris, that not once did we use these slogans. Those are for television. This is not television. This is real life.

We can pass a bill if we put aside these labels that we want to give it for the 6 o'clock news or for the 30-second sound bite, and roll up our sleeves like all good women and men should do, and be the good men and women that we are who want a bill and pass one.

But every time somebody uses one of these labels from now on, I'm serving notice on you that, when I get recognized, I'm going to ask you some questions about it. If you use a term like "engine of litigation" or "lawyers' bonanza," you're going to be called upon in public to give a reasonable and logical explanation; that I'm not going to sit idly by and let you throw these phrases out here without calling your hand on them.

So when you give a definition like this, you better be able to explain what it means in plain English to the people.

Chairman **Ford**. Does anyone else have a statement?

Mr. **Ballenger**. I'm scared to go after that.

Chairman **Ford**. Mr. Serrano?

Mr. **Serrano**. I'm almost terrified to go after that.

Thank you, Mr. Chairman.

My colleagues, it is a shame that as we approach the year 2000 and head into the 21st century, that employment discrimination on the basis of race, sex, religion or national origin remains a critical national issue. Nineteen ninety-one is here, the Nation is at war, there's continuous talk about superior technology, the Nation is facing a recession, and racism on our campuses is at an all time high.

I find it ironic that for the first time DeKlerk is discussing the dismantling of apartheid, while we here in Congress still debate a fundamental right, the equal protection for all men and women.

Today the military is still the most integrated institution in the Nation. The administration asked Latinos, African- and Asian-

American men and women to put their lives on the line in a foreign land. These men and women only ask that American finally commit its will and resources to end racial and sexist disadvantage in this, our Nation.

Those same principles that our President sees fit to engage this Nation in war to uphold for a sovereign people, that same commitment and effort must be directed toward inequities that subvert those same principles at home in America.

Pervasive discrimination in employment based on race, sex, and skin color is the most destructive element in American society. American lives have been dramatically and negatively affected by the weakening of the laws which undermine the work ethic, and are crucial to the existence of our society. When members of our society are adversely affected, our society itself stands weakened. How do we call this great Nation of ours "leader of the democratic free world," when it is so divided along racial lines?

The issue, pure and simple, is discrimination in employment and a conspiracy of those vulgar forces in society that protect and honor it. The Civil Rights Act of 1991 will allow the courts to award compensatory and punitive damages long available to victims of racial job discrimination and to victims of job discrimination on the basis of sex, religion or national origin. The act does not maintain quotas, nor does it encourage or authorize the institution of quotas as one of the remedies available to the victims of discrimination.

Opponents are further asserting that this legislation is a "lawyers' bonanza" bill that would lead to endless litigation and cost. Again, no data has been brought forward to support this claim. The struggle to pass a civil rights act should not be retarded again by "scare tactics" over nonexistent issues.

American lives are in real jeopardy. Our society should act responsibly to this segment of the population. What is important is what a civil rights act would accomplish, that being that this country, a beautiful mosaic, will neither tolerate nor support employment or racial discrimination.

In closing, Mr. Chairman, let me just say that I can think of no greater comment to be made or statement, by a country than when those parades start to take place down Pennsylvania Avenue for the returning troops, than to have at the same time a signing ceremony for the Civil Rights Act of 1991.

Thank you.

Chairman **Ford**. Mr. Roemer?

Mr. **Roemer**. Mr. Chairman, I'll make my remarks very brief.

First of all, I'd just like to associate myself with many of your remarks. I commend you for your vision and leadership in making consideration of the Civil Rights Act one of the first hearings under your Chairmanship.

Recently, Fortune has undertaken a study of the top CEOs and CFOs in the United States to determine how many of these top executives were women. I believe, out of more than 2,500, that only a miniscule number were women. I am very anxious for our distinguished witness to address some of the social and economic barriers which are precluding promotions for women. My wife helped me realize my dream to get to the United States Congress and overcome tremendous odds to beat an incumbent. She will be graduating from Georgetown University with a Masters degree in the near future. I'm very anxious to make sure she can chase the kind of dreams for promotion to do anything she wants.

Again, I am looking forward to hearing some of the personal viewpoints and perspectives of our witness today.

Thank you, Mr. Chairman.

Chairman **Ford**. Mr. Andrews?

Mr. **Andrews**. Thank you, Mr. Chairman. I just want to echo the comments of Mr. Roemer in thanking you for highlighting the importance of this issue for our committee in making it at the top of our agenda. I briefly want to ask the witnesses throughout this process to respond to perhaps a different set of questions that speak very powerfully to the need for this legislation.

We've already heard a lot and I'm sure we will hear a lot more about the cost of more vigorous compliance with our civil rights law, about the—I'll say it, too—engines of litigation and other costs that we'll allegedly incur.

I'd like to hear people talk about the cost of perpetuating discrimination in our economy. How much does it cost us when people are not given the opportunity to be employed because of their gender or their color or their religion? What productivity losses do we suffer when that occurs? How much do we lose within a firm or an enterprise when people don't feel as if they can get to the top because of their ability when there are blockages because of their race or their gender?

How much does that cost the economy? How much does it cost us to be in a situation where people are discouraged from starting their own businesses or their own ventures because of discriminatory practices which continue in the marketplace? My intuitive judgment is that as an economy, as a Federal budget, and as a country, it costs us much more to permit the cancer of discrimination to continue than it would cost for us to vigorously pursue its defeat and termination. I would ask the witnesses to talk about the economic growth benefits of opening the door of economic opportunity for everyone regardless of race or gender or religion.

Thank you, Chairman Ford.

Chairman **Ford**. Thank you. Anyone else?

Mr. **Payne**. Thank you very much, Mr. Chairman. I certainly will not prolong the opening statements. But I, too, would like to say that I'm looking forward to seeing a successful hearing so that we can send this bill to the President as soon as possible.

I would just like to say that I was very proud of the President the other day when he acknowledged finally that African-Americans serve in disproportionate numbers in the military. It was very interesting that the President, in his "read my lips" type of wisdom, said that he was proud that the military was such an open and equal opportunity employer.

He was happy that around 30 percent of the ground troops in the U.S. Army are African-American and that we should be proud of these young men and women, and we should be proud that the military gives them an opportunity.

Yesterday I attended a funeral of a young man that went to the same high school that I went to, he lived a block from where I lived. He was killed by friendly fire as we were prosecuting the war with a smart bomb. You know, we've seen terminology change. But we've seen behavior stay the same. This 18-year-old who went to war in order to go to college was laid out in my town.

The President talks about how proud he is of these African Americans who are fighting for freedom and for democracy. He talks about the fact that here we have an institution that provides so much opportunity. But in his State of the Union Address, as he used 98 percent of it to talk about international affairs, he took about a moment to say, "And send me a civil rights bill that I can pass; that I can sign; that I won't have to veto." I don't know what that is because it couldn't have been any clearer with the bill that we sent him the last time.

So, I'm just very disturbed about the hypocrisy that we see in this President, the kinder and gentler American. I hope that we send this piece of legislation to him and we're going to ask him to sign this legislation to prove to those young men and women who are coming back that he does, indeed, believe that on the home front that you shouldn't be 100 percent American on foreign soils and 50 percent of American in their own country.

Thank you.

Chairman FORD. I see no one else seeking recognition.

Our first witness today will be Dr. Heidi Hartmann, Director of the Institute for Women's Policy Research in Washington, DC. I should inform the members that because we have so many members in attendance and we did hold this bill for the purpose of hearings at the full committee, we will try to adhere to the five-minute rule.

There is that nefarious set of lights down there. When you start to speak it will be green and as you are running out of time it will turn yellow, and when it's red we would ask you to stop and give somebody else their turn. We'll go through all of the members and then come back. By holding to five minutes, which I find is a terrible restraint on my enthusiasm, so I sympathize with you, we will give everybody a chance.

Just a moment. I overlooked something. Please excuse me.

Mr. Reed had to leave and he left a statement to be inserted contemporaneously with the opening statements. Without objection, all of the members of the committee who are present or not present who wish a statement in this hearing record may submit it and it will be incorporated with the other statements made this morning.

Hearing none, so ordered.

[The prepared statement of Hon. John F. Reed follows:]

PREPARED STATEMENT OF HON. JOHN F. REED, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF RHODE ISLAND

Mr Chairman, today our committee begins deliberations on one of the most important pieces of legislation facing the 102d Congress. The Civil Rights Act of 1991 seeks to halt the erosion of Title VII of past civil rights legislation and address recent interpretations of such laws. The protection of all segments in our society from discrimination of all types is one of the cornerstones of our Nation's history. Our job is to ensure that the victories of the past continue to survive.

Much of this legislation is meant to address the biases women face in the workplace.

From 1967 to 1971, I was a cadet at West Point. At that time, the United States Military Academy was not a co-ed institution, however, this situation would soon change for the better. When I returned to West Point as a member of the faculty, I was privileged to participate in the then ongoing efforts to transform West Point from a single-sex institution into a co-educational facility. Since then female cadets have fully participated and excelled at West Point. Today, many former female cadets are serving our Nation in Operation Desert Storm. Their contributions and bravery are an inspiration to us all, yet we cannot rest on our past accomplishments. We must continue to fight gender discrimination, and guarantee that the ignorance of some does not slam the door on the progress we have made.

When we tell young women that they can achieve anything they set their minds' to, we must ensure that their dreams are not dashed due to discrimination. We must work to create career pathways which are clear of the obstacle known as gender discrimination.

We are all aware that gender bias continues. The cases this legislation seeks to clarify are also familiar. Two of today's witnesses, Ms. Morris and Ms. Ezold, were victims of such discrimination. However, many cases of sexual discrimination continue to go unreported. It is my desire that the actions of this committee and concerned citizens like today's witnesses will put an end to discrimination on the basis of gender.

Mr. Chairman, today I am proud to announce that I have joined many of my colleagues on this committee in their co-sponsorship of the Civil Rights Act of 1991, not to create quotas, but to safeguard our Nation's commitment to ending all discrimination. Thank you.

Chairman FORD. Now, Dr. Hartmann, please proceed.

STATEMENT OF DR. HEIDI HARTMANN, DIRECTOR, INSTITUTE FOR WOMEN'S POLICY RESEARCH, ACCOMPANIED BY DR. ROBERTA SPALTER-ROTH, GEORGETOWN UNIVERSITY, DEPUTY DIRECTOR FOR RESEARCH, INSTITUTE FOR WOMEN'S POLICY RESEARCH

Ms. HARTMANN. Mr. Chairman and members of the committee, I am Heidi Hartmann, Director of the Institute for Women's Policy Research. Good morning.

The Institute for Women's Policy Research is an independent scientific research institute that specializes in research on policy issues of special importance to women. I am trained as a labor economist and hold a Ph.D. degree in economics from Yale University. With me here today is Dr. Roberta Spalter-Roth, a sociologist at George Washington University, and Deputy Director for Research at IWPR, who is available to assist with responding to any comments and questions you may have.

We're very pleased to have this opportunity to testify before you today as you consider the Civil Rights Act of 1991. We would like to provide a brief summary of the major social science research findings concerning women's economic and family status, describing the situation of women and minorities in the labor force, and looking particularly at the social science evidence on the impact of the past civil rights legislation on earnings and employment.

The central conclusion of our testimony is that the U.S. economy cannot afford not to deal with discrimination. We must assure equal employment opportunity if we want to compete economically in today's world. I would like to try to summarize my testimony and submit a written copy for the record.

Before turning to look at women in the labor market, I thought it might be important just to start out with understanding how much women's contribution to family incomes has grown in the last few decades. If you look at Figure 1, it's over there, but you also have a copy of it in your testimony—I'm afraid it's very hard to make it big enough to be seen in this room—the central finding there is simply to show that families that depend on the employment of the mother, and here we're looking only at families with children, are rising in number.

The traditional form of family, which is a two-parent family where only the father works, which used to be the top line in 1975, has now moved down to only 25 percent of all families with children. Whereas, the family that has two parents and two workers has moved up from a little less than 40 percent of all families up to the most common type of family with children today, almost half of all families with children.

Also, the family that depends upon a single working parent has risen to nearly 20 percent of all families with children and there are still 9 percent of families whose parents are unable to find work and are not working.

What this shows, I think, is simply how important it is that women be able to earn fair earnings for their work because they must contribute to the support of their families. Two-thirds of all families with children are now depending on women's earnings to achieve their current standard of living. Looking at women's place in the labor market, most of this I'm sure you're intensely familiar with, women now constitute 45 percent of the labor market. In 1989, full-time year-round workers earned 68 percent of what men earned. This is an improvement in the wage gap. It used to be 59 percent back in 1975, but it's an improvement that certainly could be bigger.

For example, in the same or similar 15-year period in Australia where pay equity and other anti-discrimination efforts were enforced, the female wage ratio improved from 59 percent to 75 percent. They started out in the same place and they got much further.

I'd, also, like to point out that minority women, African-American women and Hispanic women do not fare as well as the average woman or all women. For African-American women, the earnings ratio for them to white men's earnings was only 61 percent in 1989 rather than the 68 percent average for all workers. For Hispanic women compared to white men, it was only 55 percent.

I'd like to turn your attention to Figure 2 and it's looking at the wage earnings profile. This is a new way of looking at the data that we decided to take this year and we call this chart around the office affectionately "the glass ceiling is lower than you think." This is a chart that shows the median annual full-time earnings of women workers by age compared to the median annual full-time earnings of men by age.

The higher line is men. You can see that their earnings move up very nicely as they age, peaking at about age 45 to 49. This is what we expect the average worker's experience to be, a reward for experience in the workplace. When you look at women's earnings you see virtually no reward. Their earnings peak at only $22,000 per year. Now, this is again the median worker. That earnings level is just about the same as what young men, age 25 to 29, are making.

So, women at their mature peak earnings age are making about the same as men starting out. In other words, experience is simply not rewarded for women in the workplace. There are a lot of reasons for this. There is a lot of debate among economists about how much of that is discrimination, how much of it is different choices women have made, they've chosen to spend more time with children and their family. But I think it's very difficult to look at a chart like that or any of this data and not feel that some of that must be due to unequal treatment not only in the workplace, which is the subject of these hearings today, but also in the educational system and the credit system and many other areas of life.

It's possible to find a study, of course, that says anything about whether or not there is discrimination and how much there is, so I would like to rely on the authority of the National Academy of Sciences.

A committee of the National Academy of Sciences has issued several reports on women's employment and in their 1981 report they felt that reviewing all the social science evidence, it was safe to estimate that about half of the observed gap between women's and men's earnings is due to employment discrimination. The other half is due to the lesser investment that women in the past, anyway, have made in their own human capital, in their own education. Of course, we know that is changing today.

So when we consider whether women and minority men do face a glass ceiling that prevents them from reaching the top-most echelons of employment, we also have to consider the barriers that have held them back every step of the way, and that's the reason that we say the glass ceiling is actually lower than you think. It starts way below the top most echelon.

There certainly has been improvement over time. These wage ratios have improved. You can look at that chart and see that the wage ratio is better for young women than it is for older women. It has always been better for young women. The real question is how much change is there going to be in the future, and that we don't know.

But these lines as far apart as they are, if you look at them five years ago, ten years ago, twenty years ago, they would have been even farther apart. They have been closing and yet there is still that much difference between the earnings of women and men.

Well, I'd like to look then at barriers women face in the labor market that create the situation. The first thing, of course, is that, as we've seen overall, women do earn less than men, they earn less than men in nearly every occupation. Just to give you a few examples, female physicians earn less than male physicians, it was 82 percent in 1990.

Again, for the median wages of full-time workers, here looking at weekly wages rather than annual wages, female bus drivers earn less than male bus drivers, 76 percent; secondary school teachers who are women earn less than secondary school teachers who are men, but it's much closer, 94 percent; female accountants earn less than male accountants, 75 percent; and so on.

Even in some of the occupations where women's representation has increased the most between 1983 and 1991, for example, lawyers, lawyers moved from 15 percent being female to 21 percent being female; however, the female wage ratio declined from 88 percent to 74 percent.

This is just by way of showing that there is still a great deal of wage inequality between women and men, and it needs to be addressed. We find that even when women work in the same occupations as men, as we've just been looking at, one of the reasons for these salary differences is that women seem to have lesser access to the high-wage firms and the high-wage industries.

One important study of women and men who were in sex-integrated white collar occupations showed that women actually tended to work in the lower-wage firms and industry in each labor market, while men were more likely to work in the higher-wage firms and industries. It's hard to understand how women and men or minorities and whites get segregated between firms unless there is some conscious or unconscious activity of the employer going on.

The most important thing, the most important reason, though, for women earning so much less than men is not that they earn less in each occupation, which is what we've been looking at, but that they work in substantially different occupations. There is a great deal of sex segregation still left in the labor market. In 1980, which is the most recent census data that we have, 48 percent of women, half of women, worked in occupations that were 80 percent female.

If you looked at men, it's even more concentrated, 71 percent of men work in occupations that were 80 percent male. Women and men simply don't work in the same jobs and even when they work in the same jobs they don't work in the same firms.

One very important study looked at 393 firms in California, at data that had been collected by the State Employment Service between 1959 and 1979, and this data had very specific job titles that the firms themselves used. Looking at all of the job titles in the firm, they found that three-fifths of the firms studied were totally segregated by sex. Every single job title in those firms was either all female or all male. This is data up through 1979. So the extent of sex segregation is very large.

Again, just as with the wage gap, you can ask yourself, "Well, how much of this is really discrimination and how much is choice?" It's hard to decide exactly how much. But I think you can't look at it and not decide that at least some of it is due to discrimination. To quote the National Academy of Sciences' Committee on Women's Employment and Related Social Issues again, they concluded that "The weight of scientific evidence indicates that discrimination has played a significant role in maintaining a sex-segregated work force and that job segregation by sex would be substantially reduced if barriers were removed."

Some of the barriers that the National Academy of Sciences committee cited are recruiting workers from predominantly male settings, at that time certainly such as the military and vocational education classes, recruiting workers through word of mouth, through worker referrals, requiring nonessential training or credentials that women often lack, veterans preference policies, which at that time tended to be very male-dominant, and also promotion and transfer rules that force workers to give up seniority if they try to transfer to a new job in a new department.

So there are many such factors, employment practices that influence the opportunities that women and minorities can have at work. Among the other important factors they cited were inhospitable work climate, such as sexual harassment, and cultural attitudes held by some employers that lead them to discriminate against women in particular jobs.

One of the reasons why the sex segregation that we observe in the labor market is so important is that, as we've been arguing, it certainly limits women's earning power. Again, a National Academy of Sciences committee found that the more "female" a job is, the less it pays. This is true even when you try to control for how much skill and effort and responsibility jobs require. So when you try to compare two jobs that require similar effort and responsibility, you find that the one dominated by women pays less.

This is also true of jobs dominated by minorities. An important study recently commissioned by the National Academy of Sciences looked at the California Civil Service as a nonprofit public sector employer. They simply looked at starting salaries, job titles and how the incumbents of the jobs changed. They found that over time, even though the qualifications of the job stayed the same, as more women and minorities entered that job, the starting salaries and the whole salary range fell. This is in a civil service environment. So, what we can say, then, is that the race and sex of the incumbents of the job do influence their earnings. For that reason, pay equity is a very important issue for women and minority workers that needs to be addressed.

I want to turn for a moment to remaining barriers against minority workers. Certainly a great deal of progress has been made in improving the employment of minorities. For example, we see much less race segregation in the labor market than we saw in 1945. Racial segregation has really truly declined in the labor market, whereas sex segregation has not declined quite as much. Nevertheless, lower earnings are a significant problem for all minorities. For example, African-American males earn 72 percent of what white males earned just last year in 1989, and Hispanic males earned only 64 percent of what white males earned on average. Again, we're looking at full-time workers who work year-round.

We'd like to turn to one of our studies, which is the chart on low-wage workers. We used Census Bureau data here to look at the probability of being a low-wage worker. We defined a low-wage worker as somebody who if they worked that wage they would just be able to keep a family of four above the poverty line.

We, once again, did as most economists do in looking at these wage regressions, try to standardize, try to say if we compared a women and a man, a black women and a white man, who had the same human capital characteristics. We understand they have different characteristics. But let's assume they have the same characteristics, even put them in the same industry and occupation.

When you do that, you still find that women of color were four times more likely than white males to work in low-wage jobs. We're talking about comparing people with the same human capital characteristics in the same industry and the same occupation. White women were three times more likely than a white man to find themselves in a low-wage job and men of color 1½ times more likely than white men.

Having looked at low wages, I'd, also, like to turn for a moment to women and minorities in top jobs. Here it is very difficult to get data on the CEOs and the top financial officers of the top corporations. So we decided to look at census data from the March 1990 current population survey made available by the Bureau of Labor Statistics and we looked only at the category of managers and executives and we chose to take those who were at the highest earnings levels for which data were available, $78,000 or more per year.

We found that ten percent of all white male managers earn over $78,000 a year. So, you could say that ten percent of white male managers have a shot at getting promoted beyond that glass ceiling to the very top. For white women, only one percent of managers are making over $78,000 a year. For black men, it's four percent; black women, one percent; Hispanic men, seven percent; and Hispanic women, one percent.

So what we're saying is that minority women and men, and white women are not even in a position from which they can be selected. They haven't even reached the upper levels of the management ranks so they certainly can't make it to the top most levels. So what's important, then, is to look everywhere along the pipeline. It's important to look at the very top, but it's also important to look at everything that contributes to holding back women and minorities as they move through the pipeline.

I'd like to turn now to the issue of how much discrimination is costing us in response to Mr. Andrews and I'm sure questions from others. We don't have a recent study on this to report. But we can report a study that was conducted by the Congressional Research Service in 1979. They found that at that time, looking at the 1978 GNP, that had non-whites had the same labor market position as whites, our gross national product would have been 4.4 percentage points higher. This is assuming no discrimination at all, no difference in human capital, no difference in earnings, no difference in labor market position.

We haven't yet done a careful calculation of how much more you could say discrimination costs if you also looked at discrimination against women, Hispanics, Asian-Americans, Native Americans, but even using a smaller macroeconomic multiplier than the Congressional Research Service used at the time, I came up with a rough estimate of about 30 percent, that's not really surprising because women are almost half the labor force and they make only two-thirds of what men earn and then you add Hispanics as well. So, it's a very large amount.

We would stress that the U.S. economy really cannot grow if all individuals are not allowed to contribute to their fullest. As the U.S. economy and work force diversifies by sex, race and ethnicity, this becomes an even more important economic problem. Unfortunately, at the same time that our work force has been diversifying, women and minorities coming into the work force looking for good jobs, the labor market conditions have really been deteriorating. The biggest job growth in the 1980s was among low-wage jobs.

We don't think these two things are unrelated. We think employers have to be encouraged to use minority and female workers in the same way that they use white male workers, to invest in them, to train them, to make an investment in their human capital.

We are afraid that too many employers are pursuing low wage, low productivity economic growth strategy that doesn't work very well in the short run and it certainly won't work in the long run. In the long run we cannot compete with other low-wage countries. We have to compete with high-wage countries and that requires investments in people, including women and minority workers.

So strengthening equal employment opportunity enforcement is very much a case, I think, of encouraging businesses to do what's the best for them economically in the long run. If everybody always did what was right, we wouldn't need any laws. But I think this is a case where we need laws to encourage businesses to do what is right.

I want to turn very briefly to what the research shows about whether or not equal employment opportunity enforcement works. The research shows and I could summarize it in the words of Robert Solo, who was a member of the National Academy of Sciences' committee and a Nobel Prize winning economists, he said, "The research shows that there are modest effects in the intended direction of all of the EEO enforcement that we have done."

One study, in particular, by Andrea Beller, shows that in states where enforcement efforts were stronger and enforcement efforts were measured by the number of investigations of charges and so on, that there were in those states larger increases in the ratio of female to male earnings. After the 1972 amendments, she found even larger increases. She attributed that to the 1972 amendments giving individuals the right on their own to pursue their claims in the court.

I'd like to finish our review of the data by looking at one IWPR study on the Pregnancy Discrimination Act. You might recall that back in 1976 the Supreme Court held in *Gilbert* v. *General Electric* that discrimination against pregnancy was not discrimination against women. Congress passed the Pregnancy Discrimination Act of 1978 to reverse that interpretation. We have tried to look at that act and what the cost and benefits were.

We note that the U.S. Chamber of Commerce, the National Association of Manufacturers, and the American Retail Federation all testified against the PDA. They all said it would cost too much, would bankrupt American business, et cetera, et cetera. To cast light on that, we tried to look at the costs and benefits. We did find that the costs to business were moderate and the benefits to workers were surprisingly, astonishingly huge.

What the PDA did was extend to women the right to keep their jobs after pregnancy and child birth if a man at that same employment had a right to keep a job after an accident or an illness. Not all men do, not all women do even today. But if a man had that right, then women got that right. We found that meant that women earned an additional $57 a week or, adding it up for all women, a billion dollars a year; that's a substantial gain for women workers through the passage of a very simple law, one law, in 1978.

We'd like to conclude, then, with our recommendations. Given the barriers that women and minorities still face in the labor market and the fact that past legal remedies and enforcement efforts do work, strengthening the Civil Rights Act through the enactment of H.R. 1 is both necessary and desireable.

It's desirable and necessary not only from the point of view of the individuals who are aggrieved by discrimination and are harmed by it. But, also, from the point of view of advancing economic growth in this country. We cannot have a strong economy if we do not have fair pay and equal employment opportunities for all workers. This, in fact, will, in essence, enlarge the pie for all workers—basically a pro-economic growth policy.

There's a few supplemental measures that the committee might want to look at such as some kind of permanent commission relating to women's employment or the diverse work force. We've had them in the past. It might be time to start one up again. Also, we could make greater use of the data collected by the Office of Federal Contract Compliance Programs and the EEOC by requiring them to provide an annual report card on how much progress American business and industry has made.

Thank you very much.

[The prepared statement of Dr. Heidi Hartmann follows:]

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IMPROVING EMPLOYMENT OPPORTUNITIES FOR WOMEN

TESTIMONY
Concerning H.R.1
Civil Rights Act of 1991

Before the U.S. House of Representatives
Committee on Education and Labor

February 27, 1991

by

Heidi Hartmann, Ph.D.
Director
Institute for Women's Policy Research

and

Roberta Spalter-Roth, Ph.D.
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(Corrected March 21, 1991)

SUMMARY OF TESTIMONY

This testimony uses the results of social science research to describe the importance of women's earnings for family survival, the continued existence of wage and job discrimination, and the effectiveness of civil rights and anti-discrimination policies--where implemented and enforced. Given the increasing diversity of the workforce and the negative effect of discrimination on economic growth, these findings suggest that strengthening the Civil Rights Act through H.R. 1 is both necessary and desirable, not only for workers and families, but also for improving U.S. economic performance.

The findings reported in the testimony include:

- o Families are increasingly dependent on women's earnings; 2/3 of families with children depend on mothers' earnings for family well-being.
- o Despite some progress, there is still a substantial wage gap between women and men; in 1989 median earnings for women who worked full-time year-round were only 68 percent of median earnings for men who worked full-time year-round.
- o A "glass ceiling" affects women's and minority men's earnings and opportunities--women especially are not rewarded for their greater years of work experience. Median earnings for women year-round full-time workers aged 40-44 are $22,000, about the same as the median earnings for men just starting out, aged 25-29.
- o About half of the gap in earnings between women and men can be explained by discriminatory employment practices, according to the National Academy of Sciences/ National Research Council in a 1981 report.
- o Women earn less in nearly every occupation and have lesser access to high wage firms and industries.
- o There is striking sex segregation between and within occupations, with some firms consistently exhibiting more segregation than would result from sex-neutral hiring, given the mix of occupations they employ, and more firms doing this than would be expected by chance.
- o Occupations held predominantly by women (and minority men) pay substantially less than male-dominated or mixed occupations, even when the difficulty of performing the work is equal. In a 1986 report, the National Academy of Sciences' Committee on Women's Employment and Related Social Issues found that 35 to 40 percent of the overall wage gap between women and men could be attributed to occupational segregation.
- o Regardless of human capital and job characteristics, women and minority men are more likely to earn low wages than their white male counterparts. Minority women are 4 times more likely, white women 3 times more likely, and minority men 1.5 times more likely than white men to earn low wages, even when similarly qualified.

- At the upper end of the job hierarchy, women and minority men find they are not well-represented in the pool from which the highest echelons will be filled. For example, among white male managers and executives, 10 percent earned more than $78,000 per year in 1990, while only 1 percent of white, black, or Hispanic women managers, 4 percent of all black male mangers, and 7 percent of all Hispanic male managers earned that much.

- The labor market barriers that prevent the full and productive employment of women and minorities are damaging to U.S. economic growth. A 1979 study by the Congressional Research Service found that in 1978 GNP would have been 4.4 percent higher than it actually was if blacks had not been discriminated against. Preliminary calculations by IWPR suggest that when women as well as blacks are included in the calculation, GNP would be about 15 percent higher.

- Legal remedies (when implemented and enforced) are successful methods for overcoming labor market barriers and have positive effects on decreasing job segregation and increasing women's employment, job tenure, and wages.

Mr. Chairman and Members of the Committee:

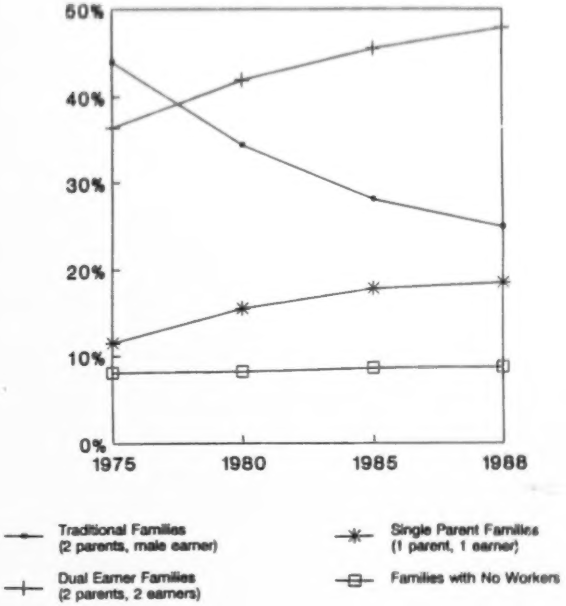
I am Heidi Hartmann, director of the Institute for Women's Policy Research (IWPR), an independent, scientific research institute specializing in research on policy issues of special importance to women. I am trained as a labor economist and hold the Ph.D. degree in economics from Yale University. With me here today is Dr. Roberta Spalter-Roth, a sociologist at George Washington University and Deputy Director for Research at IWPR, who is available to respond to your comments and questions. We are pleased to have the opportunity to testify before you today as you consider the Civil Rights Act of 1991. We would like to provide a brief summary of major social science research findings concerning women's economic and family status, the employment situation of women and minorities, and the impact of past civil rights legislation on earnings and employment. A central conclusion of our testimony is that the U.S. cannot afford *not* to deal with discrimination. If we want to compete effectively, we must strengthen the U.S. economy by ensuring equal employment opportunity for all workers.

Overview of Women's Economic and Family Status

The extent to which women participate in the labor force has increased dramatically in the past several decades, and their contribution to family incomes has grown correspondingly. In 1990, 58 percent of all women over 16 years of age worked, and 67 percent of all mothers were in the labor force, an all-time high since these data have been collected and analyzed.

Figure 1 shows that, for families with children, the dual earner couple is now the norm: 48 percent, or nearly half, of all families with children had both parents in the work force in 1988, an increase from 36 percent in 1975. The single parent family, in which the only available parent is working, has also grown rapidly as a proportion of all families, from 11 percent of all families with children in 1975 to 19 percent in 1988. At the same time, the "traditional" family, the two-parent family in which only the father works for wages, has fallen from 44 percent of all families with children to 25 percent. (There are also 9 percent of all families with no working parents.)

FIG. 1. THE INCREASING RESPONSIBILITY OF WOMEN WORKERS FOR FAMILY FINANCIAL NEEDS
(PERCENT OF ALL FAMILIES WITH CHILDREN IN EACH FAMILY TYPE)



Source: Based on data in Howard Hayghe, "Family Members in the Work Force," Monthly Labor Review, Vol. 113 (March 1990): p.17.

Two-thirds of all families with children depend on the woman's earnings to achieve their current standard of living. These data illustrate the importance of women's earnings to family well-being, especially to the well-being of families with children, but women's earnings are also important in families without children and to women who live alone and have only themselves to depend upon.

Women's Place in the Labor Market

In 1990 women constituted 45 percent of the labor force overall. Using the standard comparison provided by the Census Bureau, median earnings of full-time, year-round workers, women earned 68 percent of men's earnings in 1989. The female-male wage gap closed somewhat during the late 70's and throughout the 80's; the ratio was at 59 percent in 1975. (Looking at yet another wage series, from the Bureau of Labor Statistics, women's median weekly earnings, for full-time workers, averaged 72 percent of men's during 1990.)

By nearly all measures, women's earnings have improved relative to men's (although it should be kept in mind that part of the improvement in the ratio is due to the fall in men's real wages, which have still not recovered to their peak in 1973; during the late 1970's and throughout the 1980's women have been more likely to hold jobs in growing sectors and men in shrinking sectors experiencing real wage declines).[1] Yet relative to equality, and to the progress towards equality women have made in other countries, women in the U.S. could be expected to have done better. For example, from 1970 to 1985, the female-male wage ratio in Australia improved from 59 to 75 percent, an improvement of 16 percentage points in 15 years.[2] In the U.S., the improvement was 9 percentage points in 14 years.

Differing groups of women have fared differently in the U.S. For example, women of color earn less than white women and men of color earn less than white men. For black women relative to white men, the earnings ratio was 61 percent in 1989, for Hispanic women relative to white men, it was 55. For most of the 1970's and 1980's the wage gap between women of color and white men was closing, but during the 1980's progress slowed considerably.

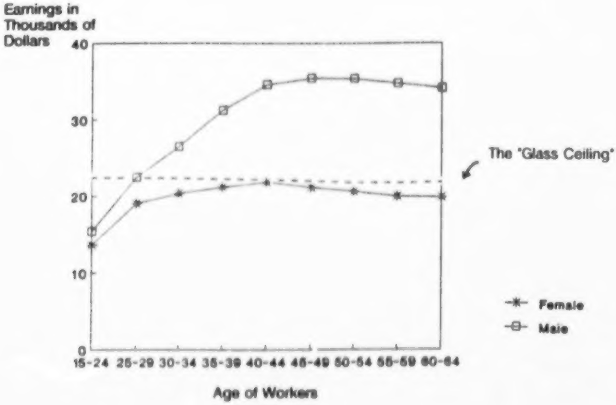
Age-Earnings Profiles

Age is particularly important in understanding the wage gap between women and men. How does the female-male wage ratio differ at different ages? Figure 2 displays the median earnings of full-time, year-round workers, for workers aged 15 through 64 in 1989. The wage gap is much larger between older women and men than it is between younger women and men. In fact, for women in the labor force today, median earnings peak at age 40-44, an age at which they are earning about the same as men aged 25-29, who are just starting out, about $22,000 per year. This annual earnings figure, which is the "glass ceiling" faced by all women workers, not only women in management, merits serious thought. A mature woman worker in the United States, with substantial years of work experience, working full-time, year-round, earns just $22,000 per year. What seems clear is that women workers, in contrast to men, are simply not rewarded for their greater years of experience as they age.

Men's earnings peak at ages 45-49; at that age, men are earning, on average, $35,000 and the gap between women and men is $14,000, for a wage ratio of 60 percent. At the younger end, ages 25-29, the gap is $4,000, and the wage ratio is 86.4 percent. (The more favorable earnings ratio for younger women and men than for older women and men has held true since such data have been collected.)

How much of this growing gap as women age is due to discrimination on the part of employers--discrimination in hiring, in earnings, in on-the-job training, in providing job-protected leave, in promotion and advancement? How much of it is due to the different choices women made over their life cycle, to invest more in children and family and less in education and the work place, or to discrimination beyond the work place, such as in the educational system? Economists disagree about the answers to these questions, but based upon the

FIG. 2. THE FEMALE-MALE WAGE GAP OVER THE LIFE CYCLE
(1989 MEDIAN ANNUAL EARNINGS, FULL-TIME, YEAR-ROUND WORKERS, BY AGE)



Source: Based on unpublished data from the U.S. Bureau of the Census, Current Population Survey.

accumulation of many research studies, including two National Academy of Sciences reports on women's employment, it is safe to estimate that about half the gap between women's and men's average wages is due to employment discrimination, that is to unequal treatment in the work place, and about half is due to the lesser amount of human capital women workers have been able to attain.[3] Women workers today do have less labor market experience than do men. (It should also be pointed out that women's decisions to invest less in education and work experience in the past--decisions that are changing for today's young women--may have been based on their perception that *rewards* to their investment would also be *less* as well as on barriers they may have faced in the educational system.)

When we consider whether a glass ceiling prevents women (and minority men) from reaching the topmost echelons of employment, we must also consider the barriers that have held them back every step of the way. Few are even in a position from which they can attempt to break through to the highest echelons. The average woman worker faces an earnings peak at $22,000 per year at ages 40-44. The 'glass ceiling' is lower than we think!

Another important question these data raise is whether today's young women will fare better than their mothers did. Will today's young women, who are making different decisions about investing time in education and the labor market, face as much discrimination as they age or not? Young women today are earning more than half the bachelors' and masters' degrees and 40 percent of the Ph.D. degrees, and they are pursuing courses of study that are more like those men study, earning degrees in business, law, medicine, and computer science. How well these women will fare is not a question research can yet answer; we will simply have to wait and see. But we have seen that, since 1975, the wage ratio has improved for all but the oldest age groups, when calculated, as above, on the basis of median annual earnings for full-time, full-year workers. For example, for workers aged 35 to 39 years, the female-male wage ratio was 52 percent in 1975, 57 percent in 1980, and 66 percent in 1989. For workers aged 25 to 29 years, the ratio improved from 69 percent in 1975 to 73 percent in 1980 to 82 percent in 1989. These

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data are cause for some optimism, but they nevertheless demonstrate a growing earnings gap as women age.

Barriers Women Face in the Labor Market

If we can agree that about half the wage gap is due to the life choices women have made -- choices that may themselves not have neen entirely free but may have been constrained in various ways -- and that half is due to unequal treatment in the labor market, let us examine the remaining labor market barriers women face.

Women Earn Less Than Men. Two labor market features stand out for women--one is that in nearly *every* occupation women earn less than men. Female physicians earn less than male physicians (82 percent in 1990 for median weekly wages of full-time workers); female bus drivers earn less than male bus drivers (76 percent); female secondary school teachers earn less than male secondary school teachers (94 percent); female accountants earn less than male accounts (75 percent); and female billing clerks earn less than male billing clerks (74 percent). Even in some of the highest-wage occupations that women have been entering, wage ratios are distressingly low, and have not improved; for example, the representation of women among lawyers increased from 15 to 21 percent between 1983 and 1990, while the female-male wage ratio declined from 88 to 74 percent. Again, some of these wage differences are due to women's lesser human capital, but some are due to discrimination.

Women, even in the same occupations as men, appear to have lesser access to the high wage firms and industries. An important study by Francine Blau showed that for women and men in integrated white collar occupations, women were more likely to be in lower-wage firms and industries in each labor market, while men were more likely to be in higher-wage firms and industries.[4] Thus women and men were segregated between firms, even when they were in reasonably integrated occupations.

Women and Men Work in Different Jobs. The second significant labor market feature is the substantial sex segregation between occupations that is observed. Women and men do not generally work in the same occupations, and even when they do, as in the example of integrated clerical occupations above, they tend to work in different firms. Data on sex segregation among occupations show that women tend to work in occupations in which other women work, that is in predominately female occupations, while men tend to work in occupations populated by other men. In 1980, the most recent census for which data are available, 48 percent of all women worked in occupations that were at least 80 percent female. These occupations included many clerical occupations (bank tellers, bookkeepers, cashiers, receptionists, secretaries) and service occupations (practical nurses, childcare workers, hairdressers). For men, the proportion working in occupations that were more than 80 percent male was even higher, 71 percent. These occupations included many professions (engineers, dentists), skilled crafts (carpenters, electricians, machinists), and operatives (meat cutters, forklift operators).[5] In an important study of sex segregation within firms, William Bielby and James Baron found an astonishing number of sex-segregated job titles.[6] Using data from 393 firms that had been collected by the California State Employment Service between 1959 and 1979, they found that 30 firms employed workers of only one sex; in an additional 201 firms, no women and men worked in the same job titles. Thus three-fifths of the firms studied were totally segregated by sex.

Although some of the segregation observed may occur because of circumstances other than employer actions, it is hard to escape the conclusion that much of the segregation observed is caused by discrimination in hiring and promotion, barriers which limit women's employment opportunities, even given the educational choices women make. As Blau found, some firms consistently exhibit more segregation than would result from sex-neutral hiring within the occupations they employ, and more firms do this than would be expected by chance. Overall, the National Academy of Sciences Committee on Women's Employment and Related Social

Issues[7] concluded that "the weight of scientific evidence indicates that discrimination has played a significant role in maintaining a sex-segregated work force" (p. 126) and that "job segregation by sex would be substantially reduced if barriers were removed" (p. 124).

Among the discriminatory practices that perpetuate sex segregation and limit women's opportunities cited in the NAS report are: recruiting workers from predominantly male settings (such as the military or vocational education classes) or recruiting through worker referrals; requiring nonessential training or credentials that women often lack; veterans' preference policies; promotion and transfer rules that force workers to give up seniority if they transfer to other departments; and factors such as inhospitable work climates and sexual harassment. Many of these are systemic factors; the report also cites cultural attitudes held by some employers that lead them to discriminate against women in particular jobs (p. 126).

The National Academy of Sciences Committee on Women's Employment, as well as other observers, have been concerned about the degree of sex segregation observed in the labor market because it almost certainly limits women's earning power. A variety of studies have shown that those occupations that are dominated by women pay substantially less than those that are not, and this is true even when the difficulty of performing different occupations is held equal. In other words, the sex of a job's incumbents has an influence on a job's wage rate, independent of the skills required to perform the job. An earlier NAS committee, the Committee on Occupational Classification and Analysis, found that in 1970 occupations that were dominated by women pay $27.50 less per year for each additional percentage point female, even when occupational requirements were taken into account; thus an all-female job paid about $2,700 less per year than an all-male job of similar skill requirements.[8] A study commissioned recently by the Panel on Pay Equity Research of the Committee on Women's Employment shows that, within the California Civil Service, starting salaries fell as minorities and women entered jobs, even though the qualifications required remained the same. The presence of women and minorities in a job title devalued the job.[9] The issue of pay equity is an important one for women and minority workers.

Thus the two most striking labor market features for women, women's lower wages and their segregation in a narrow range of occupations, are related. In its 1986 report, the NAS Committee on Women's Employment found that about 35 to 40 percent of the overall wage gap between women and men could be attributed to occupational segregation (p. 123).

Barriers Minorities Face

Minority male workers face many of the same barriers women of all races face, including employer attitudes that lead to discrimination in hiring, compensation, training, and promotion, and recruitment and assignment practices that tend to limit their employment opportunities and cause pay inequities. It should be noted, however, that over the past several decades, racial segregation appears to have declined much more than sex segregation in the labor market, at least when national level occupational data are considered.[10] Nevertheless, lower earnings remain a significant problem for all minorities, with, for example, black males earning 72 percent of white males in 1989, and Hispanic males earning 64 percent.[11]

A recent IWPR study documents the pervasiveness of race and sex discrimination in the labor market by comparing the probability of being in a low wage job across race, ethnic, and gender groups.[12] As shown in the accompanying chart, when comparisons were made holding human capital and labor market variables constant, that is considering only those workers who had similar amounts of human capital and worked in similar occupations and industries, women of color were 4 times more likely than white males to work in low wage jobs, white women were 3 times more likely, and men of color were 1.5 times more likely.

RACE AND SEX DISCRIMINATION ARE PREVALENT IN THE LABOR MARKET

An IWPR study based on data from the Survey of Income and Program Participation found that

- Race and gender influence the probability of working in a low-wage job, even for equivalent education and work experience
- Minority women are four times as likely as white men to work in low wage jobs
- White women are three times as likely as white men to work in low wage jobs
- Minority men are 1.5 times as likely as white men to work in low wage jobs

Note: The study included adult workers who worked at least 500 hours in 1984. Low wages were defined as $6.33 per hour or less in 1989 dollars, the hourly wage, which if worked full-time year-round could support a family of four at the poverty level. Low wage workers are those who earn low wages at least 7 out of 12 months.

Women and Minorities in Top Jobs

Data at the upper end of the employment scale also illustrate the substantial barriers women and minorities face. They are not yet present in sufficient numbers in the pool of managers from whom the very top leadership positions would be filled. For example, 1990 data from the Bureau of Labor Statistics on the earnings distribution for workers in executive, administrative and managerial jobs, show that 30 percent of white males in this occupational category earned more than $52,000 per year, compared with only 7.4 percent of white women. For black and Hispanic women, the proportions were somewhat lower: 6.8 and 7.2 percent respectively. Minority men are also less likely than white men to reach the higher echelons of work status. Only 11.2 percent of black men and 19.6 percent of Hispanic males in executive and managerial jobs earned over $52,000 annually, compared with the 30 percent for white males. At the highest earnings level for which data are available, $78,000 or more per year, 10 percent of all white male managers earn that much, compared to only 1 percent of white women managers, black women managers and Hispanic women mangers, 4 percent of black male managers, and 7 percent of Hispanic male managers. Women and minority men are thus in a much less favorable position from which to be selected.

Economic Growth--The Costs of Discrimination

The remaining labor market barriers that prevent the full employment of women and minorities are damaging to the U.S. economy as a whole, as well as to the individuals who experience them directly. This is increasingly so as the U.S. workforce continues to diversify by sex, race, and ethnicity. Recent labor force growth has been disproportionately female and minority, and eighty percent of the net labor force growth projected to the year 2000 will consist of women and minority men. At the same time, we are witnessing a deterioration in the conditions of work. Employer-worker relations are becoming more tenuous as part-time, temporary, and contingent jobs grow increasingly rapidly. Most of the job growth in the 1980's occurred in low wage jobs.

In our view, these two trends, the diversifying labor force and the deteriorating conditions of work, are related. Fewer good jobs at good wages are available because employers are more reluctant to invest in minority and female workers. Many employers structure jobs to anticipate lower skills and higher turnover, believing that women and minority men lack the capacity and behavioral traits necessary for learning to perform higher skilled work productively. Their employment practices reflect these stereotypes as they pursue cost reduction strategies via the development of low-wage, low-productivity jobs. But, that strategy is short sighted; in the long run the United States cannot compete with other countries via low wages, nor should we aspire to do so, for low wages mean a low standard of living. The U.S. must compete via high-wage, high-productivity jobs; this strategy requires substantial investment in all workers, including women and minority men.

The failure to employ women and minority men to their full potential results in a productivity loss that is substantial. In a 1979 study, the Congressional Research Service (CRS) found that wage and employment differentials between whites and nonwhites resulted in a loss to GNP of $93.5 billion in 1978.[13] Had nonwhites had the same labor market position as whites, GNP would have been 4.4 percentage points higher than it actually was in 1978. The CRS did not attempt to differentiate between those losses that were due to discrimination in employment and those that were due to other factors, such as lower educational attainment or poorer health status among nonwhites. Rather they argued that unemployment and wages would have been equalized between whites and nonwhites if all forms of discrimination, latent and overt, in all aspects of US life had been eliminated. We have not been able to locate more recent estimates that also include the losses due to unequal employment of ethnic groups, such as Hispanics, or of women, but if women are included, we estimate that the loss to GNP currently is about 15 percent.

Given the demographic changes underway, changes that are increasing the number and proportions of minorities and women in the labor force, strategies that strengthen equal treatment will also ensure improved productivity and greater economic growth for the U.S. Strengthening equal employment opportunity policies should be seen not only as a way to ensure labor market fairness to all workers, not only as a way to ensure equal pay for equal work, but also as a way to enhance economic growth, a way to increase the size of the pie for everyone.

The Effectiveness of Legal Remedies

Available research studies on the quantitative effects of equal employment opportunity enforcement show that stronger enforcement brings greater gains. For example, in states where enforcement efforts were stronger (enforcement efforts were measured by the number of investigations of charges and the number of settlements), Andrea Beller found that more investigations led to larger increases in the ratio of female to male earnings, and that increases were larger after the 1972 Amendments to Title VII of the 1964 Civil Rights Act than they were before the amendments.[14] Beller found that the differential between male and female earnings fell by 14 percent in the private sector between 1967 and 1974, with most of the gain coming in the post-1972 period. She attributes the improvement to the right given to individuals to pursue their claims in the courts. Likewise, the 1986 report of the NAS Committee on Women's Employment also found that in industries that were targeted by enforcement authorities (for example, construction, coal mining, banking, and telecommunications) results were substantial. Based on these findings, we suggest that additional mechanisms that increase the cost of discriminating to the employer will reduce the amount of discrimination workers face.

A recent IWPR study shows how effective a change in legal interpretation can be.[15] As a result of the Supreme Court's 1976 interpretation of Title VII in Gilbert v. General Electric, the U.S. Congress passed the Pregnancy Discrimination Act (PDA) of 1978, to affirm that discrimination against pregnancy was to be considered a form of sex discrimination. The intent of the PDA is to ensure that women affected by pregnancy and related medical conditions be treated the same as other employees--on the bases of their ability or inability to work--in all areas of employment including hiring, firing, seniority rights, and the receipt of fringe benefits.

In the hearings prior to its passage, opponents to the bill, including the U.S. Chamber of Commerce, the National Association of Manufacturers, the American Retail Federation, and the Health Insurance Association of America testified that the PDA would substantially increase the costs to business, create unfair economic burdens, and might actually lead to an increase in discrimination against women of child bearing age.[16] To cast light on the heated rhetoric that surrounds government efforts to afford equal rights to all workers, IWPR assessed the costs and benefits of the PDA in the ten years since its implementation.[17]

We found substantial benefits to women workers. First, the PDA did not have negative effects on the employment of women of childbearing age--who continued to enter the workforce in record numbers. In fact, their employment rates between 1978 and 1988 increased at a greater rate than any other age/gender group in the population. Second, the PDA gave pregnant women workers access to temporary disability insurance, increasing their job tenure and wages. In 1988, those women workers with short term disability coverage, most of whom had coverage because of the PDA, earned an additional $57.40 per week. For all women with coverage, additional earnings amounted to $1 billion for the year. Those new mothers without disability benefits lost an estimated $530 million in 1988 as a result of job loss.

The change in women's labor market behavior was so large in the 1978 to 1988 period, the increase in women's return to work after child birth so great, that one is forced to conclude that employer behavior prevented many women from returning to work previously. Many employers must have terminated women's employment at pregnancy and child birth, or many women believed their jobs would not be held for them and so resigned. When women realized these jobs would, by law, be held open for them (if employers held jobs open for similarly

ECONOMIC BENEFITS TO WOMEN WORKERS OF THE PREGNANCY DISCRIMINATION ACT OF 1978

- Between 1977 and 1988, the employment rates for women of prime childbearing age (25-34) increased more than for any other age/gender group; the PDA did not have a negative effect on the employment of this group of women as some had feared
- Access to short term disability benefits increased for pregnant women and new mothers, increasing job tenure and wages
- By 1985, more than 70 percent of women workers with disability leave benefits returned to work within six months after childbirth compared to 43 percent of those without benefits
- New mothers with short-term disability insurance worked an additional 14 weeks in 1988 compared to those without this benefit; the latter suffered additional weeks of unemployment, more time looking for work, and greater likelihood of working for a new employer
- New mothers with short-term disability insurance earned an additional $57.40 per week: $1 billion annually for all new mothers in 1988

Source: IWPR tabulations of the March 1989 Current Population Survey and Census Bureau analysis of the 1984 and 1985 panels of the Survey of Income and Program Participation

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disabled men), many women took advantage of their reemployment rights. This simple change in employer policy, brought about by a clarification of the meaning of Title VII, had such a large impact on women's earnings precisely because it improved women's ability to gain work experience, especially tenure with the same employer. Such job tenure leads to improved wages and improved on-the-job training and advancement opportunities.

Recommendations

Given the barriers that remain in the labor market and the efficacy of past legal remedies and enforcement efforts, strengthening the Civil Rights Act through enactment of H.R.1 is both necessary and desirable. For women and minority workers to receive equal pay and employment opportunities, both increased legal remedies and stronger enforcement are needed. Allowing aggrieved individuals to sue for damages strengthens enforcement; this provision can be expected to be reflected in future earnings and employment data, which will likely show an impact of this enforcement advance.

Furthermore, only with improved earnings and employment opportunities for women, both white and minority, and for minority men, can the U.S. economy achieve greater productivity gains and higher rates of economic growth. The slow economic growth of the past decade and the changing demographic composition of the labor force, in particular the influx of women and minorities into the work force, make improving equal opportunity for all workers an economic necessity as well as a matter of fairness and basic job rights. Fair pay and equal employment opportunities for workers traditionally discriminated against enhance the size of the pie for all workers.

Additional aspects of the employment situation of women, and minority men, might lead the Committee to consider supplemental measures. An independent commission that could monitor the work of the federal government on ensuring equal employment opportunities is needed, especially one that would focus especially on women's needs or on the needs of an increasingly diverse workforce.

For many decades, the Citizens' Advisory Commission on the Status of Women, and its successors, played a "watchdog" role, alerting the public to the special policy needs of women workers. Reestablishing such a Commission, perhaps under the auspices of the Congress, would provide permanent benefits. Among the special issues that deserve study and advocacy now are barriers to the advancement of women and minorities at the upper echelon of business and government and the steps needed to allow these workers to break the "glass ceiling." As the research reported here shows, however, such an investigation also requires study of what blocks women and minority men every step of the way, and in particular, what employment practices result in the negative outcomes observed for mature women, the very women who should be poised to enter the topmost jobs, yet are left far behind. Such a Commission could also serve a continuing function of monitoring the work of enforcement agencies.

For example, the Office of Federal Contract Compliance (OFCCP) currently collects affirmative action plans and supporting information from employers with federal contracts during the course of compliance reviews and complaint investigations; these documents provide information on the race and sex composition of the workers in each firm's jobs and job groups. These data provide a very good window on the sex and race segregation that still exists within U.S. firms and on earnings differentials. Without revealing the progress of individual firms, an annual OFCCP report could chart the progress US employers in the aggregate (or grouped by industry or region of the country or size of firm) are making in reducing the extent of race and sex segregation and wage inequities.

The EEOC could report annually on the content of the EEO-1 forms that are submitted by all large employers in the US. Unlike the reports submitted by employers to the OFCCP, the EEO-1 data are reported only for very large occupational groups, rather than for specific job titles, but they are reported for detailed industry groupings. What do these data show about

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equal employment opportunity in the United States--are the large occupational categories becoming more integrated, for which industries? In which states is progress greater or less? If all private employers were required, as local and state governments and institutions of higher education now are, to also report wage data, progress in reducing sex- and race-based wage discrimination could also be monitored and reported.

Annual reports could be required of both the OFCCP and the EEOC, utilizing the data they already collect. These data are (for the most part) not available to researchers and so are currently virtually unused. They should be used to produce annual reports on how much progress American business and industry (including state and local government) are making toward achieving fair pay and equal employment opportunity. Finally, the Women's Commission itself could issue an annual report card on the progress made in integrating women (and minority men) in the workforce and assuring fair rewards for all workers.

Whether these supplemental measures are considered or not, the research evidence suggests that enactment of H.R. 1 will, by strengthening our existing civil rights laws, benefit all U.S. workers and the economy as a whole.

ENDNOTES

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11. U.S. Department of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 168, Money Income and Poverty Status in the United States: 1989 (Advance Data from the March 1990 Current Population Survey), U.S. Government Printing Office, Washington, D.C., 1990.

12. Institute for Women's Policy Research, Low-Wage Jobs and Workers: Trends and Options for Change, Final Report to the Employment and Training Administration, U.S. Department of Labor, November 1989.

13. Charles C. Ciccone and John D. Fisk, Economics Division, Congressional Research Service, "An Estimate of the Loss in Potential Gross National Product Due to Existing Employment, Productivity, and Wage Differentials Between White and Nonwhite Workers in the United States," in The Cost of Racial Discrimination, Hearing before the Joint Economic Committee, U.S. Congress, October 19, 1979 (Washington, DC: US Government Printing Office, 1980; No. 56-547 O).

14. Andrea H. Beller, "The Impact of Equal Employment Opportunity laws on the Male-Female Earnings Differential," pp. 304-330 in Cynthia Lloyd, Emily S. Andrews, and Curtis Gilroy, eds., Women in the Labor Market, New York, Columbia University Press, 1979.

15. Roberta Spalter-Roth, Claudia Withers, and Sheila Gibbs, Improving Employment Opportunities for Women Workers: An Assessment of of the Ten Year Economic and Legal Impact of the Pregnancy Discrimination Act of 1978, Draft Report, Institute for Women's Policy Research, Washington, D.C., September 1990.

16. See for example, testimony of Francis T. Coleman, National Association of Manufacturers, testimony on S. 995 before the Subcommittee on Labor of the Committee on Human Resources, U.S. Senate, April 26-29, 1977.

17. On the cost side, we found that the PDA resulted in modest costs to business, estimated at $618 million per year (in 1988) which amounts to only five percent of all short-term disability payments. These costs are offset by savings of $175 million in reduced unemployment insurance benefits and premiums, plus additional savings in termination costs (estimated at between $1,100 and $1,800 per worker, or at $168-$200 million per year) and in recruitment and training costs because women workers with disability benefits that cover pregnancy return to work more often.

Chairman **Ford**. I thank you for your statement and particularly for the studies that you brought to our attention. I have to confess to you that you confirmed a lot of the intuitive feelings I've had about these issues. My wife is a lawyer who has pierced the glass ceiling and my daughter is a nurse who will never get to the glass ceiling and they remind me of this constantly. So I have an element of prejudice in some part of what you were saying.

But I appreciate the way in which you tied together the several considerations that I hope will be in this legislation before we finish it and it's exactly the kind of testimony we wanted for the members to consider as we go forward to craft any amendments we might want to make to the initial bill.

Ms. **Hartmann**. Thank you.

Chairman **Ford**. On the minority side, Mr. Fawell, you seem to be the ranking Republican at the moment.

Mr. **Fawell**. Heavenly days! Dr. Hartmann, I think I would agree with about 99.9 percent of what you said and what you said, of course, sex discrimination is still a problem. We don't know to what extent and I think you admitted yourself that there are many reasons why those statistics to which you made reference do exist, of course. I guess, no one will know for sure just what portion of the problems of lower wage and glass ceiling and so forth and so on that women face is due to discrimination.

My question that I would like to put to you, however, is the question of the alteration of remedies, which this House Bill 1 will bring about and you have indicated that you do support the alteration of remedies, which would be from—I happen to be a lawyer, also—what we would call "tortifying" a labor statute. Of course, we have in Title VII basically a place of employment labor statute.

It is, by the way, in many ways different from Section 1981, which is a very general contract dating back post-Civil War days where the Congress made it clear that discrimination on the basis of race in regard to any kind of a contract, buying a home, a loaf of bread, any kind of a contract will not be countenanced. It applies to everybody, but of course was primarily meant to be of aid to blacks as they emerged from the Civil War. So, I think it's important to point out that it is not a place of employment labor statute.

On the other hand, we have the National Labor Relations Act, a Fair Labor Standards Act, indeed, the Equal Pay Act, the Rehabilitation Act of 1973, Davis-Bacon Act, Age Discrimination in Employment, one can go on and on and on. Each of those, also, are dedicated to attempt to eliminate discrimination and injustices of one form or another, just as is the case in regard to Title VII. For 25 years, Title VII has been utilized, back pay, conciliatory movements, the injunctional features and things of this sort.

Now, my question is, do you believe we should commence at this time to use what would appear to me to be turning the remedies part of labor law statutes over really to plaintiffs' lawyers who will be able to shoot for the moon because it's unlimited compensatory and punitive damages?

If we do it here where, by the way, insofar as all of the various protected classes are concerned, they are all treated the same, black or white, Hispanic, whatever, then we have not much of an argument to say it ought not to be done in all of the labor law statutes and there would be a rebirth and great jubilation, please let me assure you as a plaintiffs' attorney, if Congress were to begin to move in that direction.

So, the question, I think, that perhaps is even more pertinent to what I would agree, and I should say the most pertinent question is that question then of do you think we should move in that direction?

Ms. **Hartmann**. Well, yes, a simple answer. I could stop there. There are sometimes I regret I'm not a lawyer, especially when I look at my earnings, but this is not one of them. I'm happy that I'm not a lawyer and I don't have to think about this in the detail that you do. But, you know, most of the provisions in H.R. 1 really go to simply restoring where we were a few years ago.

So they are not creating new remedies. I understand the damages, the ability to sue for damages does create new remedies. But that is a traditional remedy in a capitalist society. However, we feel about it, that is the remedy. If discrimination costs money, people stop doing it.

Mr. **Fawell**. May I just interrupt at this point? I don't want to deny the right to express yourself, but I am talking about the labor law statutes. It's not at all traditional. In any of our labor law statutes, compensatory and punitive damages are not given.

Ms. **Hartmann**. Right.

Mr. **Fawell**. So, we would be making a major and very significant change that would affect even liability insurance coverage for all businesses in America, too.

Dr. **Hartmann**. Right. Well, it is a traditional remedy in regulating economic situations. I guess those are the ones I'm also familiar with—the Sherman Antitrust Act, the Clayton Act—these all provide for punitive damages if you can show that business engaged in an illegal practice that harmed you as another business person or you as a consumer.

I guess the question is, should we strengthen remedies? I'd say the answer is yes. I think you want to look at how much progress we've made. What we've been able to learn is that African-Americans have had the right to sue for damages because of Section 1981. Have African-Americans made too much progress as workers in the American labor force? Does the data show that they have made——

Mr. **Fawell**. Please understand that is not a labor law statute, though, and whites and blacks alike may sue under that and, indeed, the day may come when whites will utilize it, too.

Ms. **Hartmann**. I understand this is how lawyers and economists differ. You look at precedents, we look at data.

Mr. **Fawell**. Yes.

Ms. **Hartmann**. Looking at the data, I think it does not reflect that this is too strong a remedy for employment discrimination.

Mr. **Fawell**. Would you suggest then it be used in all other labor statutes?

Ms. **Hartmann**. I'm not addressing that today.

Mr. **Miller**. I will let Dr. Hartmann respond, but the gentleman's time has expired. So, if you want to finish your response or if you're done, or whatever.

Ms. **Hartmann**. Dr. Spalter-Roth?

Ms. **Spalter-Roth**. We do, also, have some data on what happens when workers gain rights to sue and we have evidence about the Pregnancy Discrimination Act and what you do find is some increase in people using the law and, in fact, using it to sue employers for depriving them of their rights. But what happens after a very brief period of a couple of years is those really level off and what happens instead, the information that we've heard from lawyers, is that now they don't sue.

They make a phone call. They say to the employer, "Listen, it looks like we have a little problem here." They write a little letter. These things do not go to court. They are initial cases, but then it really levels off and they become precedent and they become norms of behavior for employers. I think that's what we're hoping will happen here.

Mr. **Fawell**. Mr. Chairman, can I add just one point to this, that we are talking about multimillion dollar compensatory punitive damages tort-like remedy, which does not exist, The PDA is nothing like that, which does not exist, and we have to think in terms now of whether we will break the barrier and utilize these kinds of very extensive compensatory punitive damages in all labor statutes. We can't stop just here.

Thank you.

Mr. **Miller**. Thank you.

Ms. **Hartmann**. I guess, I would like to add that, you know, unfortunately, the social science research on remedies is simply not as strong as one might like. We don't have much evidence of whether or not damages create better or lesser enforcement. But I would turn your attention to what the right to sue for damages has done for African-Americans. They have made some progress, but not a great deal. I don't think it's bankrupted. I don't think these settlements have bankrupted American business.

The south experienced economic growth after the passage of the Civil Rights Act of 1964. A lot of people attribute that economic growth to the increased ability to employ workers to their utmost capacity. So, there's a lot of evidence that this is for the economic good rather than for economic harm.

Mr. **Miller**. The gentleman's time has expired. Dr. Hartmann, let me ask you a couple of questions. I find it incredible that we would suggest that when an employer engages in intentional discrimination against an individual based upon race, that is a civil rights problem. But when you engage in intentional discrimination based on gender, that's a labor problem and not worthy of the same consideration. I agree with you that the remedy for those civil rights violations is, in fact, monetary damages.

It does tend to focus the mind of those people who engage in the same practice when they see those lawsuits successfully prosecuted and, in fact, I think that's one of the reasons why you do see the leveling off that after you watch AT&T go through the death throes of discrimination. You decide that if you're in that same caliber you ought to start talking to people. I suspect that it also happens as word filters out within the small business community that the practices ought to stop.

We had a lot of discussion of this bill in the last Congress about the cost. But as you point out, in the case of the Pregnancy Disability Act, there also appears to be some benefits that flow to the employment community and the employers. If I read your testimony correctly, the suggestion is that because people did return to their jobs, a minimum training continuity, and the integrity of their work force were able to be maintained, which are areas of concern to employers.

Can either one of you expand on that?

Ms. HARTMANN. Well, we found in looking at how much it cost employers to provide the benefits for pregnancy that they now have to provide that that turned out to be about $618 million a year in 1988. It amounted to about five percent of all short-term disability payments. But then we looked at what the savings were to employers. One of the things that happens when you don't give people back their jobs is that when they can't find a new job, they collect unemployment and unemployment insurance premiums, as you know, are experience rated. So, if there's unemployment, you have to pay higher premiums as an employer.

So, we found that the costs of providing the insurance benefit and the wage replacement for women workers was offset by savings of about $175 million in reduced unemployment insurance benefits. Any civil rights laws which increase people's rights to keep their jobs will have the same effect. People will lose jobs less and so unemployment costs will go down.

Mr. MILLER. What do we know about women who leave their jobs as a result of discriminatory practices or serious harassment? Women who simply walk away with an unreported action, who can't take it any longer, or won't take it and leave?

Ms. HARTMANN. Right.

Mr. MILLER. Has there been any discussion of that and what that costs employers?

Ms. HARTMANN. There hasn't been much.

Mr. MILLER. It's obviously hard to find those people. They don't sign out.

Ms. HARTMANN. Right. There hasn't been much in terms of quantifying the cost of people, women who leave jobs because of sexual harassment. But there have been some surveys. The general feeling is that less than 10 percent of sexual harassment is ever reported.

So there is a great deal of this happening that doesn't even come to anyone's attention. The woman does exactly what you say, leaves quietly, and that employer faces a turnover cost. Just looking at the PDA, for example, we estimated those termination costs at about $200 million a year. So they are quite significant.

Mr. MILLER. Again, under Section 1981, you would have to improve intentional discrimination. What concerns me is that when I listen to some members of the business community and other people oppose this bill, the suggestion is that somehow the penalty is unfair; that people may end up suing you for a lot of money if we determine that people's rights have been intentionally violated.

I assume, and correct me if I am wrong, that much of the decision about intentional discrimination as it relates to women is an economic decision that you will be able to pay this person less because they are a woman or because they are a minority and your company or your economic endeavor will, in fact, profit from that activity. This is an intentional decision that was made to take people of equal talent or equal skills or equal educational attainment and treat them differently.

When you start to pull apart some of the larger cases that have been brought, it was intentional, systematic, and all of the other words that go along with that activity for economic gain, not for social justice. A decision was made that you could assemble this work force in a "cheaper" or "more profitable," "less expensive," whatever terms people want to use, fashion.

We're not talking about an employer that all of a sudden wakes up one morning and finds, "Oh, my gosh, I have done this;" that's not what we're talking about. We're talking about an employer and you must prove those kinds of activities.

Ms. **Hartmann**. Well, I have not reviewed, for example, legal cases to see how many plaintiffs have been able to prove intentional discrimination. But it's my understanding that it's actually——

Mr. **Miller**. But you can't prevail if you don't.

Ms. **Hartmann**. Yes. But it's actually difficult to prove intentional discrimination in certain circumstances. I think, most of it, you know, observing as an economist, I would say that for the average woman worker most of it happens when she is channeled into her first job. You move into a sex-segregated entry level job and the job is available to you and the amount of training that's available to you over the whole course of your career with that firm is pretty much set from that moment.

Mr. **Miller**. With all due respect, we also see that in professional corporations.

Ms. **Hartmann**. Right.

Mr. **Miller**. It may be entry level, but it can be relatively high-caliber entry level, but the same actions.

Ms. **Hartmann**. Right. Exactly. I think, for example, that's one of the reasons why we see the wage gap increase between women and men in the law field, for example. So, I think that it does happen when women enter jobs at all levels. Again, we can ask ourselves how much of that is intentional and very often the entering woman and man are very similar. They are both college graduates, say. The man goes over toward a male area of the company and the woman goes over toward a female area of the company, and that is still happening.

So some of it, I think, we can attribute to employer's intentions and very often when they create a new job, they know at which wage level they're going to peg the job. They know whether the labor market, the labor supply that they're going after is going to be female or male, and that determines the wage level they peg the job at. So, of course, they know. They know if they offer "X" they're only going to get women, if they offer "Y" they're going to be able to attract men. So, very often these decisions are made at the outset.

Mr. **Miller**. Mr. Kildee?

Mr. **Kildee**. Thank you, Mr. Chairman. This is really not a question, more a corroborative testimony. I have three close advisors on issues like this representing three generations, my wife, my daughter and my mother, who is 91 years old. After mass on Sunday, when I go home, I usually discuss with my mother things that are pending down here in the Congress. She loves to discuss current events. One Sunday recently we were discussing ERA, civil rights and the Family Leave Bill.

I said to my mother, 91, I said, "Mother, you know, Gail and Laura are for these bills, and why do you think we need them?" My mother said, "Well, you know, when I was 16 years old, I went to work at the Brunswick plant in Muskegon, Michigan, and I was paid exactly half of what the men were making. Government should do something about that." Now, my mother is neither a political scientist nor an attorney, but she does believe in a just society.

I think that government should do something about that and I just want to add that corroborative testimony. I thank you for your testimony.

Ms. **Hartmann**. Thank you.

Mr. **Miller**. Mr. Gunderson.

Mr. **Gunderson**. Thank you, Mr. Chairman. I apologize for being in and out like most members and trying to cover more than one hearing at a time.

I would appreciate your comments and reflections on what I think is the most difficult part of the entire bill in front of us, which is Section 9. Let me just read it to you if you don't have it in front of you.

"No consent order or judgment settling a claim under this title shall be entered and no stipulation of dismissal of a claim shall be effective unless the parties attest to the court that a waiver of all or substantially all attorneys fees was not compelled as a condition of the settlement."

I mean, this tells me that the driving force is not a resolution of civil rights abuses, which I think everyone here deplores. What this tells me is that the driving force behind this is going to be that the plaintiff attorney files it and the plaintiff attorney determines when the settlement has occurred, not the parties, and that the plaintiff attorney will condition any settlement on how much they get paid. I'd love your comments.

Mrs. **Spalter-Roth**. Where is Mr. Washington?

Ms. **Hartmann**. Well, I can say that it's difficult to get people in this society to undertake work without getting paid for it and it's really a question of whether you think the average worker or the average lawyer, I guess, this has to be started by a worker, is going to abuse these relationships, these legal possibilities and their relationships with their employers.

It's certainly my impression talking to women in academia who have experienced many problems with discrimination that no one brings a case lightly, no worker brings a case lightly. It's a very difficult, long, very trying process to go through. It's difficult to be at odds with your employer. It's difficult to be at odds with your coworkers. You know, you really have to ask yourself to what extent have workers so far abused their privileges to bring cases to court.

My view of it is not very much. But, you know, your view might be different. I think it's hard to get a lawyer to take a case if they think they're not going to be paid for it. So that's, I guess, what's going on in that section. But there are probably other witnesses who have more expertise with which to address that issue.

Mr. **Gunderson**. Mr. Chairman, may I ask who is controlling or running the clock? I mean, that's my first question and I've already got a yellow light.

Ms. **Hartmann**. Did my time get on your time? I'm sorry.

Ms. **Spalter-Roth**. I thought the yellow light was sort of permanent here.

Mr. **Gunderson**. I need to teach somebody how to run a clock around here. I think, that's very unfair and I want you to know that.

Mr. **Miller**. Take more time.

Mr. **Gunderson**. Well, that's the signal that there's one minute to go and I think somebody is not accurately using the clock, and I just want that point made. I'm not accusing anybody. I'm telling you I have not used four minutes of my time and I resent that and I just want that known.

Let's focus on the next issue and that is we are going to have a lot of discussions today about harassment, and I want to ask the question of should the focus of harassment be from a court perspective ending the harassment or should the focus be on damages? I mean, we really struggle with this issue here as to whether we ought to look toward jury trials and damages. I'm, frankly, not totally opposed to that. But is that better or should be looking rather at a quick resolution through EEOC and a stopping of the harassment through enforcement powers? Give me some help. I'm looking for advice.

Ms. **Hartmann**. Well, again, I think that's one you're certainly all going to have to debate for a long time. I think that just based on that one study that shows that when people had the right, got the individual right to sue, you started to see more progress in the closing of the wage gap between women and men. That suggests that having the right to sue and by extension having the right to sue for damages is likely to bring about more change in employment conditions than not having that right.

It doesn't mean that we couldn't also have a strong focus on enforcement and cease and desist orders, and so forth. But the reality is with sexual harassment, and I'm sure this will come up in the next panel, that women often have already left their jobs. So there's no remedy for them unless they can get damages because if they found another job it paid just as well. They didn't even lose any wages.

Mr. **Gunderson**. Do you believe that we need additional powers for cease and desist above and beyond present law?

Ms. **Hartmann**. Well, I guess I'd rather not speak to that since I really haven't done a careful review of how often it's used and in what circumstances. Overall, I sometimes think more administrative remedies would be good in this area. But, you know, the courts have been there for people as another avenue and I think that has been very important, and the data shows that works. That brings about change having that access to the courts.

Mr. **Gunderson**. Let me focus on one of the difficult strategic questions we've had through the experience of the last session. The original incentive for a civil rights bill was clearly driven by five to six Supreme Court cases depending on who you ask.

I think there is little doubt about the desire to overturn most of those cases, a little dispute here and there as to exactly the manner, but the desire to do that. We're focusing today on the damages section and obviously on Section 9 regarding attorney's fees which goes clearly above and beyond overturning cases. It may or may not be good public policy.

My question strategically to you is, do you see any merit in us trying to enact into law a resolution and an overturning of those Supreme Court cases to where we were before the Court ruled and then, secondarily, to follow up at a later time on trying to resolve the whole issue of damages, attorney fees and whether or not we have to change the civil rights law from make whole to jury trials and punitive damages because I think this is the area that's holding us up, frankly.

Ms. **Hartmann**. Yes, I can see it's the area that's holding you up. I guess I'd refer there to the comments that Representative Mink made that we do have now an unfortunate inequality in the remedies that are available to people who are discriminated against based on two different laws.

Mr. **Gunderson**. I agree with you.

Ms. **Hartmann**. I don't see that this has created, that these extra remedies for African-Americans has created, any excessive progress or any excessive social change or any excessive cost. So based on that experience, I would say that it's logical that this remedy be extended to all of the other discriminated against parties. I don't see an economic problem with it. How you want to pursue the strategy is, of course, a matter up to you.

Mr. **Gunderson**. Thank you. Thank you, Mr. Chairman.

Mr. **Hayes**. I'm next in line. Maybe I'm a little more concerned about passage of this legislation than most because I see myself as a victim of what this hopes to cure. I realize it's not going to be a cure-all, Dr. Hartmann. I think your statement is comprehensive, but I must say that even here on Capitol Hill, by some, it's often referred to, in my race, as being the last of the existing plantations when you look at some of the things that are permitted here. Even in this body which I'm a part of, the House of Representatives, there is an under-representation of both women and blacks. We represent, both, about six percent of the membership of this House of Representatives. There's none represented in the other body as you must know.

Now, I'm not stupid enough to think that the Civil Rights Act of 1991 is going to change this kind of situation. But, I think, there is at least a need for some understanding as to the importance of doing something about sex, racial and religious discrimination. Some of it has to be guided by conviction and attitudes on the part of people who have the responsibility of making the laws.

I do hope that this committee, which I have been a part of now for eight years, concerns itself with not partisan politics, but what steps can we take to make true democracy work.

Now, I'm just greatly disturbed at the economic disadvantage that people are placed in because of acts of discrimination. I just, today, this morning, was confronted with a question and a request from some of these people who are part of the service employees here on the Hill. I was advised that they are going to be asked to take a wage cut. Now, don't endanger these people who serve us here on the Hill of reaching the Fortune 500 group. Yet we seem to be more concerned of people in that category than we do people who try to, at least, exist and live in human decency. Yes, I intend to do everything I can to stop the cut in wages of these people who serve us around here at receptions and things of this sort.

Now, I raise this only to get to a question. Opponents of this civil rights bill claim it would raise the cost of doing business substantially. Are there any cost savings that would result from this bill? You might have mentioned it. But in specific terms, isn't it possible that some people who claim losses could also see that there's something to be gained in terms of financially from passing this kind of legislation?

When you talk about cost, one of the best ways to avoid costs from suits and things of this sort is not to discriminate; isn't that right? That's a simple way to do it. So, I'd like to have you respond to that question.

Ms. HARTMANN. Well, that's right. They can avoid costs by not discriminating, period. But certainly the fact that many women do leave their jobs because of sexual harassment means that there is a high cost of turnover due to that. We haven't attempted to measure it yet. I don't know if anyone else has. I don't think so.

But any time you can avoid a termination of a worker you're saving on the order of $2,000 on average, between $1,500 and $2,000 per worker. In many large firms, the cost of terminating and hiring a new person are much, much higher, about $7,000 a worker. So that's a cost you save. Plus the other thing that you benefit from as an employer is increased productivity. You are now using all your workers, women and minorities, to their full capacity instead of keeping them down, instead of limiting their contribution to your profit making enterprise.

Again, we haven't really, you know, been able to measure the cost of that in individual firms, but we do have the CRS measure from 1979 saying that that alone for African-Americans is four percent of GNP, that's a pretty big benefit. I don't think anyone is suggesting that the litigation is going to cost four percent of GNP, and that's just looking at African-Americans, not Hispanic Americans, not Native Americans, and not women.

So, the benefits in improved productivity should be very great and I don't think anyone is suggesting that the costs on the litigation side would be anywhere near that high even in their wildest moments.

Mr. HAYES. Thank you very much. I see the stop sign has already appeared.

Chairman FORD. Are there further questions for Dr. Hartmann? Yes, Mr. de Lugo?

Mr. DE LUGO. Thank you, Mr. Chairman. Dr. Hartmann, thank you for excellent testimony. It was very helpful to me. I'm a new member of this committee and I'm a temporary member, but I will be on for the life of this Congress and I came on because of the important legislation that's going to be addressed in this Congress.

It's a pleasure for me to serve with Chairman Ford who I served with in previous Congresses on the Post Office Committee.

Now, Dr. Hartmann, except in unionized or classified employment schemes, pay equity is for the most part discretionary and subject to what we might call "free market forces." Salary ranges may be fixed, but they are so broad as to allow abuse. What do you think can be done about this?

Ms. HARTMANN. Well, I think, if you can prove that the sex of the incumbent has an influence on the setting of the wage rate of a job or there is sex or race discrimination going on in compensation, I think it's covered under Title VII. I think, you know, that we've had successful enforcement in that context. You may be asking a slightly different question.

Mr. DE LUGO. No, that's what I'm asking.

Ms. HARTMANN. Yes.

Mr. DE LUGO. I just wanted to get your response.

Ms. HARTMANN. I think you have to show that how wages are set is influenced by race or sex, and if you can show that you have a case.

Mr. DE LUGO. You have to prove the discrimination.

Ms. HARTMANN. Yes.

Mr. DE LUGO. You're very familiar because it was mentioned several times by you and also by members of this committee with what has been referred to as the "glass ceiling" initiative. The glass ceiling initiative was undertaken by former Secretary of Labor, Elizabeth Dole. What steps can Congress take to strengthen Secretary Dole's initiative?

Ms. HARTMANN. Well, I did have the privilege of looking over some of what Secretary of Labor had assigned to the Office of Federal Contract Compliance, the activities that she suggested they undertake. I think, all of those are very valuable activities. Within the Department of Labor, it's the Office of Federal Contract Compliance, of course, which monitors the behavior of Federal contractors.

Specifically, there are initiatives to look at the top most jobs and to have the compliance officers simply take a closer look at those jobs. I think that's something that needs to be done. I think there has been some discussion about whether a special commission might be appointed to look at that issue. My own preference would be to think about what type of a permanent watchdog commission we might want to put in place, issues like the glass ceiling might be something that they would address first.

I think what's involved here on this issue, in particular, is probably raising consciousness so that there's a lot that a watchdog commission oriented towards public education can probably do. There's also a lot they could do to learn from the data that are being collected.

The Office of Federal Contract Compliance does about 6,000 compliance reviews each year. That means that they're looking very closely at the data of 6,000 employers per year. Nothing much is done with that data. Nothing is done to sort of aggregate it and summarize it and say "is American business doing better this year than last year, or not."

So, you know, looking at those particular types of jobs at the very top is important. Looking at all the barriers along the way so that you're not even in the pool from which you can get that job, that's also important.

I think that the evidence also shows that leadership does set a tone, that is if the Labor Secretary says this is very important, I'm going to put my priority here, and that's transmitted to all the compliance review officers and it's also heard by all the CEOs in the country, that if forceful leadership is taken on the issue, research shows it makes a difference. People really do pay attention to what their leaders say on these issues. So, I think that anything that heighten awareness of the issue that Congress could do would be very important.

Mr. DE LUGO. Send a message.

Ms. HARTMANN. Send a message.

Mr. DE LUGO. H.R. 1 is careful not to encourage "quotas" as a measure of possible discriminatory behavior. Yet in higher corporate levels, the glass ceiling that has been much discussed here is clear, indeed. There are usually no competitive examinations or a way to measure ability. Promotions and advancement are discretionary for the most part for employees.

So, I would ask this question: Other than comparing numbers of female and minority employees who are available and qualified to receive promotions to those who actually do receive those promotions, how can equality be enforced and this glass ceiling be broken?

Ms. HARTMANN. Well, there are some things that could be worth looking at. The process by which you fill the job, you're suggesting looking at the race and sex of the available pool and comparing that to the race and sex of the people that are eventually selected. But you can, also, look at the process.

One of the things that was suggested by the OFCCP is looking at how many applicants are actually considered for that top job. If only one applicant is considered, this is sort of evidence of handpicking. It's evidence that you didn't even look at the whole pool. They do have to keep an applicant flow chart so you can see how many applicants they did consider for that job; that's one thing you can do. You can look at the recruitment methods. You can look at whether the primary method is word-of-mouth or whether these positions were actually announced and opened.

One of the biggest changes that came about in academia is that universities had to post openings. This was not done. Certainly at most of the top schools. Nobody knew whether or not there was an opening for an assistant professor in the Economics Department. So posting openings and having to make it public and not being able to simply recruit by word-of-mouth is very, very effective. So, in addition to looking just at numbers, you can look at processes and you can look at what people actually do when they're trying to fill a job.

Mr. DE LUGO. Thank you very much, Dr. Hartmann. Thank you, Chairman Ford.

Chairman FORD. Dr. Hartmann, thank you so much for the cooperation that you gave and have given in testifying to the committee on this legislation. We have been charged by the Congress with responsibility for workplace fairness, and that's the focus that we have. Fortunately, for us, it's a focus that you took this morning. There may be questions that members of the committee have to submit to you which we will send to you from The Chair. We'd appreciate it if you could respond and your answers will be placed in the record.

Ms. **Hartmann**. Thank you very much.

Chairman **Ford**. Thank you very much.

Ms. **Hartmann**. It has been a pleasure to be here and we'll be happy to help in any way we can.

Chairman **Ford**. We now have a second panel. Ms. Jackie Morris of Bonne Terre, Missouri, who will be accompanied by Michael Hoare, Esq.; Dr. Freada Klein of Klein Associates in Boston, Massachusetts; and Nancy Ezold, Esq. of Philadelphia, Pennsylvania.

Ms. **Mink**. Mr. Chairman?

Chairman **Ford**. Ms. Mink?

Ms. **Mink**. I have a unanimous consent request. I ask you now to consent, Mr. Chair, that the statement which has been submitted by Lois Robinson be included in the record at the end of this particular panel. Lois Robinson had been invited to appear before the committee as a victim of sexual harassment.

She submitted a letter indicating that the pain and agony of her trial and the necessity to appear and discuss it again was something beyond her endurance. But she did want to have her testimony in the record and even I, in reading it, must indicate that the indignities that she suffered were just beyond description. So, I would like to ask the committee's indulgence that her testimony be included, in full, together with her letter in the record.

Chairman **Ford**. Without objection, it is so ordered.

[The material to be supplied follows:]

LOIS ROBINSON

February 26, 1991

Dear members of the House Education
and Labor Committee:

I am a sexual harassment victim who recently won a Title VII case but did not get fair compensation for what I have endured. I was going to come to Washington as a witness on February 27, 1991. I decided not to come partly because my case has been a big ordeal for me and having to talk about it again to strangers, as I planned to do in my statement to you, also felt like an ordeal. I would still like you to hear it though, so I hope someone can read it out.

Sincerely yours,

Lois Robinson

Lois Robinson

Hearing on the Civil Rights Act of 1991, H.R.1
before the
House Committee on Education and Labor
February 27, 1991

STATEMENT OF LOIS ROBINSON

Good morning. My name is Lois Robinson, and I am from Jacksonville, Florida. Thank you for inviting me here today to tell my story.

I have been employed as a welder at a Jacksonville shipyard since 1977. While working there, I have been promoted from third-class welder to second-class welder, and then to first-class welder.

For many years, I was subjected to sexual harassment by my co-workers and supervisors. The judge in my case described the shipyard as "a boys' club." Less than two percent of the skilled craftspeople are women. Because the female workers were so much in the minority, we had trouble fighting the harassment.

I would like to describe for you some of the things I encountered. I am sure you will find them as offensive as I did. I apologize for describing these things in public, but I think it is important that the committee understand what is happening to American women out there in the workplace.

Over the years, I and other female employees were being subjected to what the judge in my case called "[an] extensive, pervasive posting of pictures depicting nude women, partially nude women or sexual conduct." The judge described this as "a visual assault on the sensibilities of female workers that did not relent during working hours." These pictures included wall plaques, magazine photographs, calendars, and drawings, such as:

(1) a drawing depicting a nude female torso with the words "USDA Choice" written on it;

(2) a dart board with a drawing of a woman's breast with her nipple as the bull's eye;

(3) a picture of a nude woman bending over with her buttocks and genitals exposed;

(4) a drawing of a nude woman with fluid coming from her genital area; and

(5) a picture of a woman's pubic area with a meat spatula pressed on it.

The judge concluded that a number of these pictures were specifically intended by my co-workers to offend me.

I and other women at the work place were also subjected to many comments of a sexual nature, including the following:

--"Hey pussycat, come here and give me a whiff,"

--"I'd like to get in bed with that,"

--"The more you lick it, the harder it gets."

My co-workers also wrote graffiti on the walls in a number of work areas. These writings included such things as "Lick me you whore dog bitch," which was written on a wall over a spot where I had left my jacket.

The harassment was degrading and humiliating to me. I suffered sleepless nights, terrible neck pains and felt nauseous at work, and there were many days when I simply could not face going to work. I just wanted the harassment to stop, and for the pictures to come down. However, when I began complaining about the pictures, graffiti and comments, the harassment only increased. The company refused to take any action, despite my many complaints. Instead of removing the pictures and disciplining the harassers, the company treated me like I was the problem. I think this sent a message to my co-workers that what they were doing to me was o.k.

Other female employees were subjected to similar harassment at the shipyard. One of these women testified at my trial, and the judge credited her testimony. She had been pinched on the breasts by a foreman. She had also had her ankles grabbed by a male co-worker who pulled her legs apart and stood between them. On another occasion, a shipfitter leaderman approached her with a chipping hammer handle which had been whittled to resemble a penis. He held it near her face, and told her to open her mouth. When she complained to a more senior employee about harassment, he said, "Don't worry about it. Let me blow in your ear and I'll take care of anything that comes up."

You may wonder why I chose to remain in this environment. I felt that I shouldn't have to give up my job just because of what my co-workers and supervisors were doing to me. And I also know that since the other shipyards in the area were non-union, if I took a job at another shipyard I would earn less and lose my seniority.

The judge in my case specifically found that the pictures, comments, and conduct I encountered on the job "creat[d] and contribute[d] to a sexually hostile work environment" in violation of Title VII of the Civil Rights Act of 1964. The

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company was liable for this violation, the judge held, because its response to the problem was "inadequate" and "unsympathetic". Indeed, the court held that the company had actually condoned some of the harassment. The court concluded-- and I quote-- that "[the company] received adequate actual knowledge of the state of the work environment, but like an ostrich, chose to bury its head in the sand rather than learn more about the conditions to which female employees...were subjected."

The judge found that this harassment had a "cumulative, eroding affect" on my well-being that affected my work performance. Nevertheless, the judge awarded me only $1.00 in nominal damages. Although I missed roughly 160 days of work over a six-year period because of the harassment, and consequently lost over $13,600 in pay and opportunities for more in overtime, the judge refused to award me any back pay. The judge said he denied me back pay because I could not prove all of the precise dates of the work days I missed, and because I had not proved that a constructive discharge existed as to each of those specific dates. I also recovered nothing to compensate me for the misery I have endured. Although I also filed a tort claim, I voluntarily withdrew it before trial on the advice of counsel because Florida law was against my chances of recovering anything for the emotional distress from sexual harassment.

This whole experience has taken years out of my life. It stays with me all the time. The courts found that all my claims were credible, and that the company had violated the law, but then awarded me only $1.00 in nominal damages. That seemed like a slap in the face to me.

Nor do I believe the injunction issued by the court is likely to be effective. The judge's decision came out on a Friday, and the following Monday I encountered more obscene pictures at work. Right now, the company simply doesn't have much incentive to change.

I think employers would pay much closer attention to the problem of sexual harassment if Congress amended Title VII to allow plaintiffs to recover damages. I think it would also help plaintiffs to find lawyers so that it is possible to fight cases like mine; I could not find a lawyer in Jacksonville to take my case and most women there are not lucky like I was finding a women's rights law center like NOW Legal Defense and Education Fund to represent them. I realize that amending Title VII might not benefit me personally, since my case is just about over. But it might prevent other working women from having to go through what I went through and help them to get justice if they do go through it.

Thank you.

2-1-91

BNA's Daily Reporter System

DAILY LABOR REPORT

FULL TEXT
SECTION

DECISION OF MIDDLE DISTRICT OF FLORIDA IN ROBINSON v. JACKSONVILLE SHIPYARDS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LOIS ROBINSON,

Plaintiff,

vs. Case No. 86-927-Civ-J-12

JACKSONVILLE SHIPYARDS, INC.,
et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was commenced by plaintiff Lois Robinson pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and Executive Order No. 11246, as amended. Plaintiff asserts defendants created and encouraged a sexually hostile, intimidating work environment. Her claim centers around the presence in the workplace of pictures of women in various stages of undress and in sexually suggestive or submissive poses, as well as remarks by male employees and supervisors which demean women. Defendants dispute plaintiff's description of the work environment and maintain that, to the extent the work environment may be found to satisfy the legal definition of a hostile work environment, they are not liable for the acts that give rise to such a description. Defendants further contest the Court's authority to structure a remedy in the form sought by plaintiff.

This non-jury action was tried by the Court over the course of eight days in January and February 1989 with final arguments subsequently submitted in writing. Testimony was received from various persons who were involved in the events allegedly creating the hostile work environment. The testimony of several witnesses was received in deposition form.[1] Each side presented two expert witnesses. Photographs and other documentary evidence were received. The Court has fully considered the believability of the testimony presented, including the credibility of witnesses, and has also carefully reviewed the photographs and other documentary evidence. Based thereon, the Court finds that certain of the defendants violated

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[1] Six witnesses were unavailable and testified by deposition: Arnold McIlwain, Lawrence Brown, Quentin McMillan, Steven Leach, Harry Wingate, and Ross Sanders. Additionally, deposition testimony was received for several witnesses who testified: John Stewart, Ella Lovett, Everette Owens, Elmer Artwardt, John Kiedrowski, Fred Turner, Leslie Albert, and Lawanna Gail Banks. The parties designated portions of these depositions and the parties' lists of designations were filed as exhibits. In several instances the deposition accompanied the exhibit and in several instances the deposition had been filed with the Court previously. For simplicity, the Court will cite to the deposition excerpts, when appropriate, in the form "[deponent's last name] Depo. at [page number(s)]."

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Title VII through the maintenance of a sexually hostile work environment and thereby discriminated against plaintiff because of her sex. In so holding, the Court makes the following Findings of Fact and Conclusions of Law in accordance with Fed. R. Civ. P. 52(a).[1] To the extent that any Findings of Fact constitute Conclusions of Law, they are adopted as such; to the extent that any Conclusions of Law constitute Findings of Fact, they are so adopted.

FINDINGS OF FACT

Parties

1. Plaintiff Lois Robinson ("Robinson") is a female employee of Jacksonville Shipyards, Inc. ("JSI"). She has been a welder since September 1977. Robinson is one of a very small number of female skilled craftworkers employed by JSI. Between 1977 and the present, Robinson was promoted from third-class welder to second-class welder and from second-class welder to her present position as a first-class welder.

2. JSI is a Florida corporation that runs several shipyards engaged in the business of ship repair, including the Commercial Yard and the Mayport Yard. (The Court takes judicial notice of the closing and the reopening of the Commercial Yard operation subsequent to the trial of this case.) JSI does ship repair work for the federal government Department of the Navy. *See* P. Exh. No. 73 (list of Navy vessels JSI worked on during 1983-88). As a federal contractor, JSI has affirmative action and non-discrimination obligations. 6 T.T. at 80-81 (stipulation by counsel); P. Exh. No. 34.

3. Defendant Arnold McIlwain ("McIlwain") held the office of President of JSI from the time Robinson was hired by the company through the time of the trial of this case. (The Court is aware from news reports that McIlwain no longer holds the office.) In that capacity he was the highest-ranking officer at JSI; as such he had supervisory authority over Robinson throughout her employment at JSI.

4. Defendant Lawrence Brown ("Brown") has been Vice-President for Operations at JSI since 1980. During the time relevant to this case, he oversaw the operations of the Commercial Yard and the Mayport Yard and formulated policies and regulations concerning the conduct and treatment of JSI employees at these two yards. He had and has supervisory authority over Robinson.

5. Defendant John Stewart ("Stewart") has been Industrial Relations Manager of JSI since 1981. During the time relevant to this case, he was responsible for personnel policies at all of JSI's facilities, including the Mayport Yard and the Commercial Yard, and was in charge of handling Equal Employment Opportunity (EEO) complaints filed against JSI.

6. Defendant Elmer L. Ahlwardt ("Ahlwardt") was Vice-President of the Mayport Yard from 1977 to 1988. During that time, he was the highest ranking official and principal supervisor at the Mayport Yard. (He retired from JSI in 1988.) He had supervisory authority over Robinson throughout her employment by JSI when she worked at the Mayport Yard.

7. Defendant Everette P. Owens ("Owens") was a yard superintendent at the Mayport Yard from 1973 until 1986. (He was not working at the time of the trial due to an injury.) He was responsible for managing the daily operation of the Mayport Yard; he had supervisory authority over Robinson when she worked there.

8. Defendant Ellis Lovett ("Lovett") has been shipfitters' foreman at JSI's Mayport Yard since approximately 1970. Lovett handled personnel problems in his shop, including reprimanding shipfitters at the Mayport Yard.

9. Defendant John Kiedrowski ("Kiedrowski") was promoted from first-class welder to leaderman at JSI in 1976, and since that time he has held the position of either quarterman or leaderman. Kiedrowski has exercised limited supervisory authority over Robinson and has inspected her work. Kiedrowski Depo. at 42. In January 1985 Kiedrowski was the most senior person in the welding department on the day shift at the Mayport Yard and aboard the U.S.S. *Saratoga*. 6 T.T. at 87.

The JSI Workplace

10. In addition to a welding department, JSI's other craft departments include shipfitting, sheetmetal, electrical, transportation, shipping and receiving (including locomotive

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[1] The Court directly incorporates into its findings those matters admitted by the defendants in their responses to plaintiff's requests for admissions, which appear in P. Exh. No. 8, and those matters stipulated to in the Amended Pretrial Stipulation, filed herein on October 30, 1989. No supporting citation is given for factual statements drawn from these two sources. *See Monmouth County Corr. Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417, 1432 (D.N.J. 1984). To the extent that any evidence presented at trial varied from these admissions, the Court must treat the matters admitted as conclusively established, e.g., *Haun v. Humana, Inc.*, 651 F. Supp. 120, 122 (W.D. Ky. 1986), and must refuse to consider the inconsistent evidence, see, e.g., *Shakman v. Democratic Org. of Cook County*, 481 F. Supp. 1315, 1316 n.35 (N.D. Ill. 1979). Defendants did not move to amend or vacate their admissions, so the Court has not evaluated whether the standards applicable to such a motion could be met. *See, e.g., Brook Village N. Assocs. v. General Elec. Co.*, 686 F.2d 66, 70-73 (1st Cir. 1982) (setting forth standards for pretrial and trial motions for amending admissions); see also *Smith v. National Bank of Atlanta*, 837 F.2d 1575, 1577-78 (11th Cir.) (adopting central premise of *Brook Village*), cert. denied, 488 U.S. 821 (1988).

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carpenter, boilermaker, inside machine, outside machine, rigging, quality assurance and pipe. Employees in these craft departments may be assigned to work at either the Mayport Yard, situated at the Mayport Naval Station, or the Commercial Yard, situated at a riverfront site in downtown Jacksonville and sometimes referred to as the downtown yard. Robinson's job assignments at JSI have required her to work at both the Commercial Yard and the Mayport Yard.

11. The term "shop" has two meanings at the shipyards. The various craft departments are called shops. These departments also have permanent physical locations that are called shops. A craft department may bear a nickname; for example, the shipfitters' shop is sometimes referred to as the fab shop.

12. At Mayport, the shops are housed in several large buildings in the "backyard compound." When an aircraft carrier is docked for repair, the ship gives a compound to JSI in a hangar bay in which to put trailers which serve as temporary offices for each shop or department. The shipboard compound may range from approximately 30 feet by 100 feet to 80 feet by 150 feet. The space between the trailers on either side of the compound is approximately wide enough to allow passage of a truck. Each trailer houses two temporary offices, about six feet by twelve feet in size, which may be empty, or may contain office furniture (for example, desks and bulletin boards). Workers store their equipment in the trailers and congregate there with coworkers, both to socialize and for work-related reasons.

13. Robinson's job assignments at the Mayport Yard have included "combination jobs" in which she sometimes works as a welder in combination with shipfitters. At times, Robinson has been directed by her superiors to stand in front of the shipfitters' trailer to get her assignment from the shipfitters' leaderman. When welders work with shipfitters at the Mayport Yard, it is not unusual for them to go into the shipfitters' trailer. Robinson has, for example, gone into the shipfitters' trailer to check on paperwork or her assignment.

14. Ship repair work is a dangerous profession. JSI acknowledges the need to "provide a working environment that is safe and healthful." Jt. Exh. No. 11, at 37 (collective bargaining agreement); see also Jt. Exh. No. 12 (JSI Safety Instructions and General Company Rules). Accidents pose a continuing risk and do happen; as defendant McIlwain noted, where individuals are working together, "one slip" could lead to someone getting hurt. McIlwain Depo. at 37. Welding, Robinson's profession, poses particular risks. See Turner Depo. at 62-65 (falling, slipping, burns, flammable gas).

15. Quartermen and leadermen at JSI are union bargaining unit employees who assign and check the work performed by craftworkers. Quartermen are below foremen in authority, but a quarterman does the foreman's job when the foreman is absent from the work area. Owens Depo. at 33-34. Leadermen are directly below quartermen in authority and look to quartermen as their immediate supervisors. 5 T.T. at 172. Leadermen often are the most senior persons in a shop in a work area. See, e.g., 7 T.T. at 128; 8 T.T. at 67. Leadermen, however, lack the authority to hire, fire, or promote other employees. 8 T.T. at 69. Leadermen cannot discipline other workers, id., although they can make recommendations to the foremen about discipline, McMillan Depo. at 137. Leadermen have no authority to resolve or adjust formal employee grievances. 8 T.T. at 69.

The JSI Working Environment

16. JSI is, in the words of its employees, "a boys club," 4 T.T. at 38, and "more or less a man's world," McMillan Depo. at 97. Women craftworkers are an extreme rarity. The company's EEO-1 reports from 1980 to 1987 typically show that women form less than 5 percent of the skilled crafts. P. Exh. Nos. 35-42. For example, JSI reported employing 2 women and 958 men as skilled craftworkers in 1980, 7 women and 1,010 men as skilled craftworkers in 1983, and 6 women and 846 men as skilled craftworkers in 1986. Henry Sterling, a shift superintendent at the Commercial Yard, testified that on a busy shift he may see only 8 or 10 women, while seeing 150 men; on a quiet shift he may see no women at all. 7 T.T. at 21-22; see also 5 T.T. at 169 (welding leaderman estimated shift of 80 to 100 people included only 1 or 2 women); Lovett Depo. at 8 (only 5 or 6 of 98 shipfitters are female); Turner Depo. at 8 (only 2 of approximately 100 welders are female). Leslie Albert, Lawanna Gail Banks, and Robinson each testified that she was the only woman in a crowd of men on occasions when each was sexually harassed at JSI. See, e.g., 1 T.T. at 32-33, 112-14, 175-78; 2 T.T. at 16, 28-37; 3 T.T. at 42-47, 52-54, 64-66, 109-11; 4 T.T. at 11-12, 25-26, 75-77. JSI has never employed a woman as a leaderman, quarterman, assistant foreman, foreman, superintendent, or coordinator. Nor has any woman ever held a position of Vice-President or President of JSI.

17. Pictures of nude and partially nude women appear throughout the JSI workplace in the form of magazines, plaques on the wall, photographs torn from magazines and affixed to the wall or attached to calendars supplied by advertising tool supply companies ("vendors'

advertising calendars"). Two plaques consisting of pictures of naked women, affixed to wood and varnished, were introduced into evidence, Jt. Exh. Nos. 6, 7, and identified by several witnesses as having been on display for years at JSI in the fab shop area under the supervision of defendant Lovett. 1 T.T. at 101; 7 T.T. at 84; 8 T.T. at 142-43.

18. Advertising calendars, such as Joint Exhibits Nos. 1-5, have been delivered for years to JSI by vendors with whom it does business. JSI officers then distribute the advertising calendars among JSI employees with the full knowledge and approval of JSI management. JSI employees are free to post these advertising calendars in the workplace. (It is not a condition of JSI's contracts with the vendors that the advertising calendars be posted.) A major supplier of advertising calendars to JSI is Whidden Valve and Gauge Repair, Inc.; Valve Repair, Inc. also does business with JSI and also delivers advertising calendars to the company. Joint Exhibit No. 1 is the 1984 Whidden Valve and Gauge Repair, Inc. calendar that was distributed among employees at JSI; it hung in the pipe shop at the Mayport Yard, among other places. The exhibit designated as Joint Exhibit No. 2 is a copy of an advertising calendar from Whidden Valve and Gauge Repair, Inc. that was posted, among other places, in the shipfitters' temporary office on the U.S.S. *Saratoga* in January 1985. Joint Exhibit No. 5 is a copy of a Valve Repair, Inc. calendar that was distributed at JSI in 1987 and which was on display in, among other places, the offices of the foreman and leaderman of the pipe shop at the Commercial Yard. Generally speaking, these calendars feature women in various stages of undress and in sexually suggestive or submissive poses. A description in greater detail of the calendars' contents is set forth in Findings of Fact ("FOF") ¶ 25. Several male JSI employees corroborated the display of similar advertising calendars at JSI. See, e.g., 6 T.T. at 130, 143 (Owens); *id.* at 198-200 (Ahwardt); 7 T.T. at 53 (McBride); *id.* at 79, 93 (Cooney).

19. JSI has never distributed nor tolerated the distribution of a calendar or calendars with pictures of nude or partially nude men. Ahwardt stated that he has never seen a picture of a nude man at JSI and would be surprised to see one. Ahwardt Depo. at 100-01. Lovett said that he would probably throw such a calendar in the trash. Lovett Depo. at 19-20. Welding foreman Fred Turner noted it was accepted at the shipyards for vendors to supply calendars of nude women, but he had never known of a vendor distributing a calendar of nude men and, if one did so, he would think the "son of a bitch" was "queer." Turner Depo. at 52-53.

20. JSI employees are encouraged to request permission to post most kinds of materials; however, prior approval by the company is not required for the posting of advertising calendars with pictures of nude or partially nude women. JSI management has denied employees' requests to post political materials, advertisements and commercial materials.

21. Bringing magazines and newspapers on the job is prohibited, 6 T.T. at 139-42, but male JSI employees read pornographic magazines in the workplace without apparent sanctions, see 7 T.T. at 215-23 (testimony of Ray Wingate regarding Robinson's complaint about coworker reading pornographic magazine on the job). Although JSI employees are discouraged by management from reading on the job, they are not prohibited from tearing sexually suggestive or explicit pictures of women out of such magazines and displaying them on the workplace walls at JSI. Kiedrowski Depo. at 76-77; see also Leach Depo. at 19-21, 26 (Playboy and Penthouse magazines in desk drawers in shipfitting shop and trailer office; Leach showed them to other men in the fab shop); McMillan Depo. at 46-47 (magazines showing nude women kept in storeroom and transportation department for JSI male employees to read).

22. Management employees from the very top down condoned these displays; often they had their own pictures. McIlwain, for example, has been aware for years of Playboy- and Penthouse-style pictures showing nude women posted in the workplace; he refused to issue a policy prohibiting the display of such pictures. McIlwain Depo. at 56-57, 81-82. Both Brown and Stewart have encountered pictures of nude or partially nude women in the work environment at JSI. Nevertheless, both men have concluded, and agreed with each other, that there is nothing wrong with pictures of naked or partially naked women being posted in the JSI workplace. Ahwardt kept a "pin-up" himself. 6 T.T. at 207. Lovett, like some other foremen, had vendors' advertising calendars in his office. Lovett Depo. at 35-36; Jt. Exh. No. 5. Coordinators, who are members of management, 6 T.T. at 132, and who are responsible for ensuring that government contracts are performed to the satisfaction of the federal government, have had pornographic magazines in the desks of their trailers. 5 T.T. at 180.

Sexual Harassment of Plaintiff

23. Robinson credibly testified to the extensive, pervasive posting of pictures depicting nude women, partially nude women, or sexual conduct and to the occurrence of other forms of harassing behavior perpetrated by her male coworkers and supervisors. Her testimony covered the full term of her employment, from 1977 to 1988. The Court considered

those incidents that fall outside the time frame of a Title VII complaint for the purpose of determining the context of the incidents which are actionable (i.e., whether the more recent conduct may be dismissed as an aberration or must be considered to be a part of the work environment) and for the purpose of assessing the reasonableness of the response by defendants to the complaints that Robinson made during the Title VII time frame. The Court also recognizes some limitations in Robinson's testimony. She tried to ignore some sexual comments. Her testimony included many episodes of harassment not previously disclosed in her answers to defendants' interrogatories because, as stated in those answers, the frequency with which the incidents occurred over the course of her employment made delineating every one a difficult task. Robinson's demeanor at trial reflected the emotional nature of her recollections. Moreover, the large number of male employees and the often surreptitious nature of the postings and graffiti writings left Robinson incapable of identifying many of her harassers. (Indeed, a perusal of her testimony and that of her coworkers reveals that many persons in the shipyards knew each other only by nicknames.) These limitations, however, do not diminish the weight and the usefulness of the testimony. The individual episodes illustrate and lend credibility to the broader assertion of pervasiveness.

24. Robinson's testimony provides a vivid description of a visual assault on the sensibilities of female workers at JSI that did not relent during working hours. She credibly testified that the pervasiveness of the pictures left her unable to recount every example, but those pictures which she did describe illustrate the extent of this aspect of the work environment at JSI. She testified to seeing in the period prior to April 4, 1984, the three hundredth day prior to the filing of her EEOC charge:

(a) a picture of a woman, breasts and pubic area exposed, inside a drydock area in 1977 or 1978. 1 T.T. at 104.

(b) a picture of a nude Black woman, pubic area exposed to reveal her labia, seen in the public locker room. 1 T.T. at 105.

(c) drawings and graffiti on the walls, including a drawing depicting a frontal view of a nude female torso with the words "USDA Choice" written on it, at the Commercial Yard in the late 1970's or early 1980's, in an area where Robinson was assigned to work. 1 T.T. at 112-13.

(d) a picture of a woman's pubic area with a meat spatula pressed on it, observed on a wall next to the sheetmetal shop at Mayport in the late 1970's. 1 T.T. at 113.

(e) centerfold-style pictures in the Mayport Yard toolroom trailer, which Robinson saw daily in the necessary course of her work for over one month in the late 1970s. 1 T.T. at 106-08. Neal McCormick, a toolroom worker from 1975 to 1980, verified that the toolroom personnel had indeed displayed pictures of nude women "of the Playboy centerfold variety" during the time he worked there. 6 T.T. at 66-67.

(f) pictures of nude or partially nude women in the fab shop lockers at the Commercial Yard in 1978 through 1980. 1 T.T. at 110-11.

(g) a pornographic magazine handed to Robinson by a male coworker in front of other coworkers in the early 1980s. 1 T.T. at 110-11.

(h) a magazine containing pictures of nude and partially nude women in the possession of a pipefitter, in 1980, who was reading it in the engine room of a ship. 2 T.T. at 17.

(i) pictures in the shipfitters' shop at the Commercial Yard, in 1983, observed by Robinson while she was walking to the welding shop, including a frontal nude with a shaved pubic area and a corseted nude with her breasts and buttocks area exposed. 1 T.T. at 120-21. Robinson complained to John Robinson, the quarterman on the third shift in the shipfitting department, about the second picture; he took it down that night and she never saw the picture again. Id.

(j) a picture of a woman with her breasts exposed, on the outside of a shack on a ship in the Commercial Yard. 2 T.T. at 18. Robinson enlisted the assistance of union vice-president Leroy Yeomans to have the picture removed. 6 T.T. at 221-22, 228-29. It was removed within a day or two.

25. Robinson's testimony concerning visual harassment in the period commencing April 4, 1984, includes:

(a) a picture of a nude woman with long blonde hair wearing high heels and holding a whip, waved around by a coworker, Freddie Dixon, in 1984, in an enclosed area where Robinson and approximately six men were working. 1 T.T. at 114-20. Robinson testified she felt particularly targeted by this action because she has long blonde hair and works with a welding tool known as a whip. Id. at 114. Dixon admitted that he had indeed waved the picture around for other male employees to see, but denied that he intended to target or offend Robinson. 7 T.T. at 150. In fact, Dixon claimed that he was unaware that Robinson was in the area and that he was unaware that Robinson was a blonde. Id. at 149-51. The Court does not find his denials credible; the evidence more readily supports the conclusion that Dixon intended to offend Robinson or acted with such disregard for her that the harassment could be equated with intent.

(b) calendars posted in the pipe shop in the Commercial Yard, in 1983 or 1984, including a picture in which a nude woman was bending over with her buttocks and genitals exposed to view. 1 T.T. at 121-22. (Joint Exh. No. 1 was admitted as illustrative of this type of calendar. It is a Whiteln Valve and Gauge calendar for 1984. The naked breasts or buttocks of each model are exposed in every month; the pubic areas also are visible on the models featured in April and September. Several of the pictures are suggestive of sexually submissive behavior.) Robinson testified that she observed at least three pictures posted in the pipe shop. Id. Although this was not Robinson's usual work area, she was in that shop with a leaderman to find the pipe shop leaderman to clarify a work matter. Id. at 122.

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(c) a picture of a nude woman with long blond hair sitting in front of a mirror brushing her hair, in a storage area on a ship. 1 T.T. at 123. Robinson mentioned to either a leaderman or the assistant foreman that she considered it a "very dirty shop," and she was subsequently reassigned to a different location. Id.

(d) Joint Exh. No. 3, a Whiden Valve & Gauge calendar for 1985, which features Playboy playmate of the month pictures on each page. 2 T.T. at 21. The female models in the calendar are fully or partially nude. In every month except February, April, and November, the model's breasts are fully exposed. The pubic areas are exposed on the women featured in August and December. Several of the pictures are suggestive of sexually submissive behavior.

(e) several pictures of nude or partially nude women posted in the fab shop area in the backyard of the Mayport Yard, in January 1985, visible to her from her path to and from the time clock building. 1 T.T. at 19-20.

(f) pictures in the shipfitters' trailer on board the *U.S.S. Saratoga*, in January 1985, including one picture of two nude women apparently engaged in lesbian sex. 1 T.T. at 22-23. Robinson later observed a calendar, Jt. Exh. No. 2, in the office. Id. at 44-45. This calendar, distributed by Whiden Valve and Gauge, features pictures of nude and partially nude women each month. The breasts of each model are exposed; the pubic areas of the models also are exposed for May, October and December. Several of the pictures are suggestive of sexually submissive behavior.

(g) pictures in the toolroom trailer aboard the *U.S.S. Saratoga*, in January 1985, including one of a nude woman with long blond hair lying down propped up on her elbow and a smaller black and white photograph of a female nude. 1 T.T. at 24-25. These pictures formed a part of Robinson's complaint that forms the foundation of this lawsuit. The details are recounted infra FOF ¶¶ 98-118.

(h) pictures in the fab shop area, in January 1985, including one of a woman wearing black tights, the top pulled down to expose her breasts to view, and one of a nude woman in an outdoor setting apparently playing with a piece of cloth between her legs. 1 T.T. at 55-56.

(i) Joint Exh. No. 4, a Whiden Valve & Gauge calendar for 1986, which features Playboy playmate of the month pictures on each page. 1 T.T. at 103-04. The female models in this calendar are fully or partially nude. In every month except April, the model's breasts are fully exposed. The pubic areas are exposed on the women featured in May, June and December. Several of the pictures are suggestive of sexually submissive behavior.

(j) a picture of a nude woman left on the tool box where Robinson returned her tools, in the summer of 1986. 2 T.T. at 35. The photograph depicted the woman's legs spread apart, knees bent up toward her chest, exposing her breasts and genitals. Id. at 35. Several men were present and laughed at Robinson when she appeared upset by the picture. Id. at 36-37.

(k) pictures seen in the shipfitters' trailer, in 1986, including one of a woman with short blond hair, wearing a dark vest pulled back to expose her breasts. 1 T.T. at 192. Robinson complained to shipfitter leaderman Danny Miracle about the photograph of the blond woman. Miracle removed the photograph, with some reluctance, but it was posted again shortly thereafter. 8 T.T. at 70-71. It was not visible from outside the trailer when it was posted the second time. Id.

(l) a sexually-oriented cartoon, D. Exh. No. 1, posted in the safety office, in 1986, at the Mayport Yard. 1 T.T. at 183-86.

(m) pictures observed in the fab shop area office, in 1986, including Jt. Exh. No. 6, 1 T.T. at 101, and a picture of a topless brown haired woman. 3 T.T. at 5-7. Joint Exh. No. 6 is a wooden plaque consisting of a picture of a very young-looking woman with one breast fully exposed and the other breast partially exposed. Robinson also remarked that another plaque was present in that shop, without further identifying it. Other testimony indicated that Jt. Exh. No. 7 hung in the fab shop at that time. Jt. Exh. No. 7 shows a nude woman straddling a hammock with her head tossed back and her back arched. Her exposed breasts are fully visible as is some pubic hair.

(n) a life-size drawing of a nude woman on a divider in the sheetmetal shop, in April 1987, which remained on the walls for several weeks. 1 T.T. at 169-70.

(o) a drawing on a heater control box, approximately one foot square, of a nude woman with fluid coming from her genital area, in 1987, at the Commercial Yard. 1 T.T. at 170-72.

(p) Joint Exh. No. 5, a Valve Repair, Inc. calendar for 1987, which features Playboy playmate of the month pictures on each page. 1 T.T. at 172-73. (Defendants have admitted that the calendar was displayed during 1987 in the foreman's and leaderman's offices of the pipe shop at the Commercial Yard.) The female models in the calendar are fully or partially nude. In every month the model's breasts are fully exposed. The pubic areas are exposed on the women featured in March and September. Several of the pictures are suggestive of sexually submissive behavior.

(q) a dart board with a drawing of a woman's breast with her nipple as the bull's eye, in 1987 or 1988, at the Commercial Yard. 1 T.T. at 175-76.

(r) pornographic magazines, including Players, on a table by the gangway of a ship, in 1987 or 1988, where JSI machinists were looking through them and commenting on the pictures, 1 T.T. at 180-82, a Club magazine held out by coworker Thomas Adams in the bow of a ship, id. at 183-84, several magazines being read by pipefitters, in 1986, aboard a ship at the Mayport Yard, 2 T.T. at 16, and various other instances of welders with magazines throughout the 1980's, id. at 18.

(s) pictures of nude and partially nude women posted in the engine room of the M/V Splay, in 1988, at the Commercial Yard, including a picture of a nude woman in a kneeling position and a calendar featuring photographs of nude women. 1 T.T. at 177-79. Robinson complained to her leaderman, who in turn found a person associated with the ship to remove and cover the pictures. Id. at 179. Later, however, the pictures were again posted and uncovered. Id. at 179-80.

(t) a shirt worn by the shop steward, in December 1988, with a drawing of bare female breasts and the words "DALLAS WHOREHOUSE" written on it. 2 T.T. at 204-05.

26. In January 1985, following a complaint by Robinson concerning a calendar in the shipfitters' trailer, the words "Men Only" were painted on the door to that trailer. Full details of this incident are recounted infra FOF ¶¶ 102-106.

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27. Robinson also testified about comments of a sexual nature she recalled hearing at JSI from coworkers. In some instances these comments were made while she also was in the presence of the pictures of nude or partially nude women. Among the remarks Robinson recalled are: "Hey pussycat, come here and give me a whiff," 1 T.T. at 54-55; "The more you lick it, the harder it gets," id. at 98 (incorrectly transcribed as "The more you look at it . . . "); "I'd like to get in bed with that," id. at 175; "I'd like to have some of that," id.; "Black women taste like sardines," id. at 120; "It doesn't hurt women to have sex right after childbirth," id.; "That one there is mine" (referring to a picture in a magazine), id. at 181; "Watch out for Chet. He's Chester the Molester" (referring to a cartoon character in a pornographic magazine who molests little girls), 2 T.T. at 17; "You rate about an 8 or a 9 on a scale of 10," id. at 18. She recalled one occasion on which a welder told her he wished her shirt would blow over her head so he could look, 1 T.T. at 126, another occasion on which a fitter told her he wished her shirt was tighter (because he thought it would be sexier), id. at 127-28, an occasion on which a foreman candidate asked her to "come sit" on his lap, id. at 130, and innumerable occasions on which a coworker or supervisor called her "honey," "dear," "baby," "sugar," "sugar-booger," and "momma" instead of calling her by her name, id. at 57, 128, 173-74. Robinson additionally related her exposure to joking comments by male coworkers about a woman pipefitter whose initials are "V.D." 2 T.T. at 17-18.

28. Robinson encountered particularly severe verbal harassment from a shipfitter, George Nelson ("Nelson"), while assigned to work with him on a number of different nights in 1986 at the Mayport Yard. Nelson regularly expressed his displeasure at working with Robinson, making such remarks as "women are only fit company for something that howls" and "there's nothing worse than having to work around women." 1 T.T. at 198-201. On one occasion, Nelson responded to Robinson's inquiry regarding a work assignment by stating, "I don't know, I don't care where you go. You can go flash the sailors if you want." Id. at 196-97. On other occasions, Nelson ridiculed Robinson in front of the Navy fire watch personnel. Id. at 197-98. When Robinson confronted Nelson over her perception of his behavior as sexual harassment, Nelson denied he was engaging in harassment because he had not propositioned her for sexual favors. Id. at 200. Nelson subsequently made Robinson's perception of "harassment" a new subject of ridicule and accused her of "crusading on a rabbit." 2 T.T. at 5.

29. On one occasion, George Leach told an offensive joke in Robinson's presence, the subject matter of which concerned "boola-boola," a reference to sodomous rape. 1 T.T. at 131-35. He admitted telling the joke but maintained that he told it quietly and Robinson had taken steps to avoid hearing the joke. The Court credits Robinson's testimony and further observes that the work environment is not rendered less hostile by a male coworker's demand of a female worker that she "take cover" so that the men can exchange dirty jokes. Leach later teased Robinson in a threatening fashion by yelling "boola-boola" at her in the parking lot at JSI. Robinson subsequently learned that some shipfitters had dubbed her "boola-boola" as a nickname arising out of these events. Id. at 133.

30. Robinson testified concerning the presence of abusive language written on the walls in her working areas in 1987 and 1988. Among the graffiti were the phrases "lick me you whore dog bitch," "eat me," and "pussy." The first phrase appeared on the wall over a spot where Robinson had left her jacket. 1 T.T. at 163-65. The second phrase was freshly painted in Robinson's work area when she observed it. Id. at 165-67. The third phrase appeared during a break after she left her work area to get a drink of water. Id. at 167-68.

31. Donald Furr, Robinson's leaderman, attested to further evidence of the frequency with which the abusive graffiti occurred. He stated that he had seen words like "pussy" and "cunt" written on the walls in the JSI workplace. 5 T.T. at 166-67. He added that at one point "it was getting to be an almost every night occasion [Robinson] wanted something scribbled out or a picture tooken [sic] down . . . ." Id. at 171.

Sexual Harassment of Other Female Craftworkers

32. The Court heard testimony from two of Robinson's female coworkers, Lawanna Gail Banks ("Banks") and Leslie Albert ("Albert"), concerning incidents of sexual harassment to which they were subjected, including incidents that did not occur in Robinson's presence. The Court heard this evidence for several reasons. First, as with the incidents outside the time frame of a Title VII complaint involving Robinson, incidents involving other female employees place the conduct at issue in context. The pervasiveness of conduct constituting sexual harassment outside Robinson's presence works to rebut the assertion that the conduct of which Robinson complains is isolated or rare. Second, the issue in this case is the nature of the work environment. This environment is shaped by more than the face-to-face encounters between Robinson and male coworkers and supervisors. The perception that the work

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environment is hostile can be influenced by the treatment of other persons of a plaintiff's protected class, even if that treatment is learned second-hand. Last, other incidents of sexual harassment are directly relevant to an employer's liability for the acts of employees and to the issue of an appropriate remedy for the sexual harassment perpetrated against Robinson.

33. Banks and Albert both confirmed the description of the work environment related by Robinson. Each of these other women endured many incidents of sexually harassing behavior. To the extent that defendants attempted to show that either Banks or Albert engaged in behavior demonstrating a welcomeness of the sexually harassing behavior or a lack of offense at such behavior, the Court does not find these contentions credible. Rather, for reasons expressed in the expert testimony infra, the Court finds the description of these witnesses' behavior to be consistent with the coping strategies employed by women who are victims of a sexually hostile work environment.

34. Banks testified that she experienced what she considers to be sexual harassment in the form of comments, pictures, public humiliation and touching by male coworkers and supervisors. 3 T.T. at 30-31. The harassing behavior negatively affected her attitude toward work; she had to prepare herself mentally each day for what might happen. *Id.* at 131-32. Among the incidents to which she credibly testified:

(a) being pinched on the breasts by a foreman, *id.* at 34-35;

(b) having her ankles grabbed by a male coworker who pulled her legs apart and stood between them, *id.* at 36-37;

(c) hearing such comments as "it's a cunt hair off," *id.* at 38, "are you on the rag," *id.* at 51, and "what do you sleep in?," *id.* at 46. Indeed, a welding department supervisor, John Nicholas, testified that he personally had used the first two of these phrases, as well as "put some hair around it." 7 T.T. at 229, 238. Banks testified Nicholas remarked to her that she would "go to hell for cutting pussy," 3 T.T. at 42, a remark which Nicholas denied, 7 T.T. at 226. Banks testified that Herbert Kennedy, a foreman, told her that "she's sitting on a goldmine," 3 T.T. at 49-50, a phrase that Nicholas testified he had heard used in the shipyards, 7 T.T. at 229, although Nicholas did not name any person who used the phrase;

(d) receiving verbal abuse from a rigger named Hawkins. On one occasion Hawkins belittled Banks' concern over a large rat by making a quip that Banks took to be a sexual reference. 3 T.T. at 43-44. The following day Hawkins humiliated Banks by stating, in front of a large group of male coworkers, "If you fell into a barrel of dicks, you'd come up sucking your thumb." *Id.* at 42-46;

(e) receiving a variety of harassment from a rigger named John Fraser. Fraser sniffed at Banks' behind while she was walking up a gangway, producing laughter from the group of men observing the incident. 3 T.T. at 53-54. Fraser also placed a large flashlight in his pants in Banks' presence to create the illusion of a large penis. *Id.* at 54-55. (Fraser admitted that he had done this with a flashlight, but denied that it was done in Banks' presence. 8 T.T. at 128.) Fraser once so bothered Banks during a bus ride at work that she swore at him and felt compelled to immediately report his actions, first to her leaderman, then his leaderman. 3 T.T. at 56-57. His leaderman, Eugene Sharpe ("Sharpe"), responded in a fashion that left Banks feeling humiliated. *Id.* at 57-59. In fact, Banks was summoned before her supervisor the next day and called to task for having sworn at Fraser. *Id.* at 60-66;

(f) suffering the embarrassment of having a shipfitter leaderman, Ernie Edenfield ("Edenfield"), hold a chipping hammer handle, which was whittled to resemble a penis, near her face while he told her to open her mouth. 3 T.T. at 83-86. (Edenfield denied having done this. 7 T.T. at 164-65.)

(g) enduring the unwelcome advances of a coworker, a pipefitter named Romeo Bascugiun, who pursued her for dates and talked explicitly about his reputed sexual prowess. 3 T.T. at 72-81, 173-77. Banks complained to Kiedrowski about Bascugiun's advances and Kiedrowski spoke to him about his behavior. 8 T.T. at 94-96. Banks also testified to two other incidents involving calls to her home by JSI employees, including a supervisor, who expressed sexual interest in her. 3 T.T. at 129-30.[7]

35. Banks observed pictures of nude and partially nude women throughout the workplace at JSI. 3 T.T. at 114-17, 120-22, 124. She did not take as great offense at the pictures as Robinson did, but Banks stated that she steered clear of men who worked where such pictures were displayed because she came to expect more harassment from those men. 3 T.T. at 125, 179-80.

36. Following Robinson's complaints to management about the pictures of nude or partially nude women, Banks observed an increase in the number of pictures and in the objectionableness of their content. 3 T.T. at 88, 94, 123. On two occasions when Banks was the only woman on the company bus, male coworkers displayed or read from pornographic magazines. *Id.* at 103-04, 109-11. Banks also testified concerning two occasions in which male coworkers posted pictures with an apparent animus toward Robinson. A coworker, Chris Lay, showed a number of men, and Banks, a picture of a nude woman with a welding shield. He remarked, "Lois would really like this," and placed it on the wall in the welding trailer aboard the *U.S.S. Saratoga*. *Id.* at 97-98. Banks removed the picture when the men had left. *Id.* at 98. Approximately the same time, some male pipefitters placed a picture of a nude woman on

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[7] While incidents outside the workplace do not provide a basis for concluding that the workplace is sexually hostile, the circumstances of these two incidents make them worthy of this brief notation in order to develop fully the record respecting the degree to which the work environment shaped attitudes that transcended the confines of the shipyards.

Robinson's toolbox. Banks removed it, but another picture was placed there and subsequently discovered by Robinson. *Id.* at 100-03.

37. Albert, a machinist at *JSI* from 1976 to 1986, testified to a description of the work environment consistent with that described by Robinson and Banks. She related sexual comments identical to or similar to those heard by Robinson and Banks, see 4 T.T. at 32-36, 75-77, and noted that the recollection of specific incidents was hampered by the commonplace, daily nature of the comments, *id.* In one noteworthy incident, a male coworker persistently propositioned Albert, prompting her to complain to her leaderman and assistant foreman. The propositions continued after those individuals spoke to the coworker. When he finally put his hands on Albert, she responded both verbally and physically. Thereafter the coworker was fired, although the circumstances in the record of his discharge do not indicate whether the discharge was for the sexually harassing behavior or for drunkenness and sleeping on the job. *See id.* at 54-58.

38. Albert also testified to the pervasive presence of pictures of nude and partially nude women throughout the shipyards, and the increase of male employee attention to such pictures following Robinson's complaints over the presence of the pictures. Among the incidents to which she credibly testified:

(a) observing a large poster of a nude woman with profuse hair growing down the centerline of her body posted on a wall in the transportation department, 4 T.T. at 10-13. A male coworker asked Albert if she had similar hair. *Id.*

(b) observing the vendors' advertising calendars previously described, the "girlie" magazines kept in the outside machine shop trailer desk drawer, and a variety of men's adult magazines, such as *Playboy, Penthouse, Cheri, Chic,* and foreign titles, kept in trailers and carried by male employees in their back pockets. *Id.* at 13-20.

(c) finding a foreign magazine, left open on a table in the shipfitters' trailer, containing a picture of two women engaged in a sexual act while a nude man watched. *Id.* at 21-23.

(d) being shown a picture of a nude woman engaged in a pose of masturbation by Sharpe, a leaderman in the rigging department. *Id.* at 25-26.

(e) being shown a picture of a nude man by Steven Leach ("Leach"), a leaderman in the shipfitting department. *Id.* at 26-28. This incident occurred after Robinson's complaints concerning pictures in the shipyards. Albert also testified that Leach would engage in teasing behavior directed toward Robinson and other women by closing a book in his hand and declaring, "we can't let her see that." *Id.* at 73-74.

(f) observing pictures of scantily-dressed women in garters and brassieres with tassels in Lovett's office in 1984 or 1985. *Id.* at 24-25.

Admissions by Male Employees and Supervisors

39. Defendants have admitted that pictures of nude or partially nude women have been posted in the shipfitters' trailer at the Mayport Yard during Robinson's employment at *JSI*. *See* Kiedrowski Depo. at 18-19; Jt. Exh. No. 2 (calendar actually posted in that office); 7 T.T. at 173-74 (Edenfield's description of "obscene pictures" posted); 8 T.T. at 106-07. Defendants and their agents also have admitted that these kinds of photographs have been displayed in and around the fab shop at the Mayport Yard. Lovett Depo. at 30-31; 7 T.T. at 58.

40. The few witnesses who claimed never to have seen pictures such as those described by Robinson, Banks, and Albert, e.g., 8 T.T. at 227 (Yeomans); 7 T.T. at 205 (Martin), cannot be credited given the weight of the credible and corroborated testimony to the contrary.

41. Based on the foregoing, the Court finds that sexually harassing behavior occured throughout the *JSI* working environment with both frequency and intensity over the relevant time period. Robinson did not welcome such behavior.

Effect of JSI Work Environment on Women

42. The foregoing evidence was supplemented with the testimony of various experts. Plaintiff called experts in the fields of sexual stereotyping and sexual harassment; defendants presented expert testimony on the relative offensiveness of pornographic materials to men and women.

Plaintiff's Expert Witness Testimony

43. Dr. Susan Fiske appeared as an expert witness on plaintiff's behalf to testify on the subject of sexual stereotyping. Dr. Fiske holds a full professorship in the psychology department at the University of Massachusetts at Amherst. Her credentials in the field of stereotyping are impressive. She is a member of the American Psychological Association and the Society for Experimental Social Psychology. Dr. Fiske has performed research for the National Science Foundation and the National Institute of Mental Health. She has published nearly forty articles in the top journals in her field. She generally does not accept offers to appear as an expert witness, having turned down fourteen such offers and having appeared as an expert previously only once, in the case *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985), *aff'd in relevant part*, 825 F.2d 458, 467 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989), *on remand*, 737 F. Supp. 1202 (D.D.C. 1990), *aff'd*, __ F.2d __, 1990

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WL 191408 (D.C. Cir. Dec. 4, 1990). Her testimony and expertise were well-regarded in that case. The Court accepted Dr. Fiske, without objection, as an expert in stereotyping.

44. The study of stereotyping is the study of category based responses in the human thought and perceptual processes. Stereotyping, prejudice, and discrimination are the three basic kinds of category-based responses. Stereotyping exists primarily as a thought process, prejudice develops as an emotional or an evaluative process, primarily negative in nature, while discrimination manifests itself as a behavioral response. 4 T.T. at 177-78. Discrimination in this context is defined by the treatment of a person differently and less favorably because of the category to which that person belongs. *Id.* at 178-79. Either stereotyping or prejudice may form the basis for discrimination.

45. To categorize people along certain lines means their suitability will be evaluated in those terms as well. In the process of perceiving people as divided into groups, a person tends to maximize the differences among groups, exaggerating those differences, and minimize the differences within groups. 4 T.T. at 179-80. In practice, this translates into a perception that women are more similar to other women and more different from men (and vice versa) than they actually may be. *Id.* This perceptual process produces the in-group/out-group phenomenon: members of the other group or groups are viewed less favorably. *Id.* at 181. This categorizing process can produce discriminatory results in employment settings if it leads a person in that job setting to judge another person based on some quality unrelated to job performance into which the other person falls.

46. For example, when a superior categorizes a female employee based on her sex, that superior evaluates her in terms of characteristics that comport with stereotypes assigned to women rather than in terms of her job skills and performance. 4 T.T. at 182. Thus, to categorize a female employee along the lines of sex produces an evaluation of her suitability as a "woman" who might be expected to be sexy, affectionate and attractive; this female employee would be evaluated less favorably if she is seen as not conforming to that model without regard for her job performance. *Id.* at 183; 5 T.T. at 26-27. Interestingly, this example is borne out in testimony by several witnesses called by defendants, who expressed disapproval of Robinson's demeanor because she did not meet the expectation of "affectionate" female behavior, see, e.g., 5 T.T. at 197 (Leach); 7 T.T. at 18 (Starling); *id.* at 180 (Mayder); *id.* at 196 (Bright); 8 T.T. at 151-53 (Lowder), or who expressed disapproval of Banks' use of "crude" language as inappropriate behavior for a "lady," see, e.g., 7 T.T. at 159-61 (George Livingston).

47. Dr. Fiske reviewed documentation in this case, including fifteen depositions of male and female JSI employees, defendants' responses to plaintiff's requests for admissions, and the EEO-1 reports prepared by JSI. Based on this review, she concluded, "the conditions exist for sex stereotyping at Jacksonville Shipyards and . . . many of the effects of sex stereotyping exist . . . ." 4 T.T. at 177. Dr. Fiske described the sex stereotyping at JSI as a situation of "sex role spillover," where the evaluation of women employees by their coworkers and supervisors takes place in terms of the sexuality of the women and their worth as sex objects rather than their merit as craft workers. *Id.* at 183.

48. Dr. Fiske identified several preconditions that enhance the presence of stereotyping in a workplace. The four categories of preconditions are: (1) rarity; (2) priming (or category accessibility); (3) work environment structure; and (4) ambience of the work environment. Stereotyping may occur in the absence of these conditions; studies have demonstrated, however, a statistically significant correlation between these preconditions and the prevalence of stereotyping. 5 T.T. at 17, 30-31, 41. All of the preconditions are present in the work environment at JSI.

49. "Rarity" exists when an individual's group is small in number in relation to its contrasting group, so that each individual member is seen as one of a kind -- a solo or near solo. Rarity or "solo" status exists when an individual's group comprises fifteen to twenty percent or less of the work force in the relevant work environment. 5 T.T. at 13. Women at JSI in general occupy solo status and rarity is extreme for women in the skilled crafts. *See supra* FOF ¶ 16.

50. Solos capture the attention of the members of the majority group, providing fodder for their rumors and constantly receiving their scrutiny. 4 T.T. at 186. The solo is far more likely to become the victim of stereotyping than a member of the majority group, and the stereotype develops along the dimension that makes the solos rare. *Id.* at 187; 5 T.T. at 15-17. Solos typically elicit extreme responses from members of the majority group. Thus, mildly substandard work performance or workplace behavior is perceived as much worse when a solo is the worker than when a member of the majority group is responsible. 4 T.T. at 187. According to Dr. Fiske, the studies concerning the perception of solo work performance and

behavior demonstrates that the solo status per se, not the behavior, produces the extreme reaction from other people. *Id.* at 187-88.

51. The second precondition for stereotyping, "priming" or "category accessibility" is a process in which specific stimuli in the work environment prime certain categories for the application of stereotypical thinking. 4 T.T. at 188. The priming impact created by the availability of photographs of nude and partially nude women, sexual joking, and sexual slurs holds particular application in the JSI workplace. *Id.* at 189-90.

52. Dr. Fiske testified these stimuli may encourage a significant proportion of the male population in the workforce to view and interact with women coworkers as if those women are sex objects. 4 T.T. at 192-94. She described one study, Mohr & Zanna, *Treating Women as Sex Objects: Look to the (Gender Schematic) Male Who Has Viewed Pornography*, 16 Pers. & Soc. Psych. Bull. 296 (1990), which in her view confirmed this proposition. This study used randomly assigned male college students as subjects who viewed either a nonviolent "fairly normal sexual" pornographic film or a film having no pornographic content. Subsequently, a woman interviewed the subjects without knowing which film they watched. Two effects emerged. First, the males who viewed the pornographic film remembered little about the female interviewer other than her physical attributes. The males who viewed the neutral film remembered the contents of the interview. Second, the female interviewer could reliably distinguish between the males who had seen the pornographic films and those who had not because the conduct of the former group during the interviews was different. These two results held for approximately half of the men who viewed the pornographic films, those men who fit the description "sex role schematic." These men are oriented to their masculinity and their sexuality as an important part of their self-concept. 4 T.T. at 190-92. This proportion -- about half of the men fitting the description of sex role schematic -- holds for the general population. 4 T.T. at 192.

53. The testimony of witnesses confirms a correlation between the presence of pictures and sexual comments and the level of sexual preoccupation of some of the male workers whose conduct had sexual overtones observable by female workers.

54. The third precondition for an increased frequency of stereotyping is the nature of the power structure or hierarchy in the work environment. This factor examines the group affiliation of the persons in the positions of power and the degree to which particular groups are given a sense of belonging. At JSI, this precondition arises because the people affected by the sexualized working conditions are women and the people deciding what to do about it are men. The in-group/out-group effect diminishes the impact of the women's concerns. The men who receive the complaints perceive those complaints less favorably and take them less seriously because they come from women. 5 T.T. at 4-5. Specific instances of the handling of complaints of sexual harassment, developed *infra*, demonstrate the phenomenon of male supervisors trivializing the valid complaints of Robinson and other female workers.

55. Dr. Fiske addressed a hypothetical concerning the effect of a sexualized workplace on a complaint lodged by a female employee. 5 T.T. at 6-8. The hypothetical involved a work environment where women are solos and men control the power structure. A woman complains about a man who exposed himself to her. Dr. Fiske predicted that, where sexualization of the workplace has occurred, the woman lodging the complaint would be the focus of attention, rather than the misconduct of which she complains. The woman would be perceived as the problem; she might be subject to ridicule and become the subject of rumors. The man likely would not be disciplined commensurate with the misconduct. Dr. Fiske's prediction is borne out in part by Albert's testimony concerning two male coworkers' discussion of an incident at JSI in which a male employee had exposed himself to a female employee. *See* 4 T.T. at 37-38; *see also* 6 T.T. at 37 (Stewart dismissing gravity of complaint as "one person's word against another's").

56. In a like manner, Dr. Fiske predicted that a female employee who complained about sexual pictures of women would, in the hypothetical environment, find that she is perceived as the problem and dismissed as a complainer. 5 T.T. at 9-11. The content of the speculations and reactions to the complainer, in a sexualized work environment, would focus on her sexuality. Aspersions may be cast on the sexuality of the complaining employee regarding, for example, her sexual preference, background, experiences or traumas. Dr. Fiske found it unsurprising that male employees at JSI entertained such derogatory rumors concerning Robinson. *Id.* at 11; *see also* Leach Depo. at 47 (describing rumors about Robinson's sexuality).

57. The fourth precondition is the ambience of the work environment. According to Dr. Fiske, studies show that the tolerance of nonprofessional conduct promotes the stereotyping of women in terms of their sex object status. For instance, when profanity is

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evident, women are three times more likely to be treated as sex objects than in a workplace where profanity is not tolerated. 4 T.T. at 195-96. When sexual joking is common in a work environment, stereotyping of women in terms of their sex object status is three to seven times more likely to occur. 5 T.T. at 5. These results obtain for a wide range of employment settings, including settings in which women hold nontraditional jobs.

58. Nonprofessional ambience imposes much harsher effects on women than on men. The general principle, as stated by Dr. Fiske, is "when sex comes into the workplace, women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it." 4 T.T. at 197. The effects encompass emotional upset, *id.*, reduced job satisfaction, 5 T.T. at 18, the deterrence of women from seeking jobs or promotions, 4 T.T. at 198, and an increase of women quitting jobs, getting transferred, or being fired because of the sexualization of the workplace, *id.* By contrast, the effect of the sexualization of the workplace is "vanishingly small" for men. *Id.* at 197-98.

59. Men and women respond to sex issues in the workplace to a degree that exceeds normal differences in other perceptual reactions between them. 4 T.T. at 198. For example, research reveals a near flip-flop of attitudes when both men and women were asked what their responses would be to being sexually approached in the workplace. Approximately two-thirds of the men responded that they would be flattered; only fifteen percent would feel insulted. For the women the proportions are reversed. *Id.*

60. The sexualization of the workplace imposes burdens on women that are not borne by men. 4 T.T. at 199. Women must constantly monitor their behavior to determine whether they are eliciting sexual attention. They must conform their behavior to the existence of the sexual stereotyping either by becoming sexy and responsive to the men who flirt with them or by becoming rigid, standoffish, and distant so as to make it clear that they are not interested in the status of sex object. *Id.*

61. Two major effects of stereotyping were described by Dr. Fiske. One effect is selective interpretation. The individual who engages in stereotyping of another person because of that person's membership in a minority group selectively interprets behavior of the other person along the lines of the stereotypes applied to the group. 4 T.T. at 200-01. Thus, an employer may respond to a complaint by a female employee by stereotyping her as "an overly emotional woman," and thereafter ignore her complaints as exaggerated or insignificant. *Id.* at 201. (Behavior of this sort is apparent in JSI's responses to female complaints concerning sexual harassment described *infra*.) A second effect of stereotyping is denigration of the individual merit of the person who is stereotyped. *Id.* The presence of stereotyping in the workplace affects the job turnover and job satisfaction of the members of the group subjected to stereotyping. *Id.* at 199-200; 5 T.T. at 18.

62. Dr. Fiske's testimony provided a sound, credible theoretical framework from which to conclude that the presence of pictures of nude and partially nude women, sexual comments, sexual joking, and other behaviors previously described creates and contributes to a sexually hostile work environment. Moreover, this framework provides an evidentiary basis for concluding that a sexualized working environment is abusive to a woman because of her sex. Defendants did not provide any basis to question the theory of stereotyping and its relationship to the work environment. It appears to the Court that the primary concern raised by defendants concerning Dr. Fiske's testimony was the materials upon which she relied for a description of the JSI workplace. The Court is of the opinion that the more credible testimony describing the JSI workplace supports the assumptions upon which Dr. Fiske relied.

63. Ms. K.C. Wagner appeared as an expert witness on plaintiff's behalf to testify on common patterns and responses to sexual harassment and remedial steps. (Ms. Wagner's testimony concerning prevention of harassment at JSI is discussed *infra* on the matter of appropriate remedies.) Ms. Wagner is a self-employed consultant in the area of issues regarding women and the work environment, with particular emphasis on the prevention of sexual harassment on the job. She worked for the Working Women's Institute, an organization devoted to the study and remedy of sexual harassment in the workplace, for seven years, where she held positions as counseling director and program director before being named executive director. She holds a master's degree in social work from Hunter College. She has been an instructor in sexual harassment courses for managers and human relations specialists. She has been a consultant to employers to train supervisors and employees concerning sexual harassment and she also has been a consultant to an organization called Women in the Trades. Her expertise and experience concerning women in nontraditional employment settings is impressive. The Court accepted Ms. Wagner, over the objection of defendants, as an expert on common patterns and responses to sexual harassment and accepted her, without objection, as an expert in education and training relative to sexual harassment.

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64. According to Ms. Wagner, women in nontraditional employment who form a small minority of the workforce are at particular risk of suffering male worker behaviors such as sexual teasing, sexual joking, and the display of materials of a sexual nature. The proposition finds support in the published research and in Ms. Wagner's own experience in counseling over two hundred women in nontraditional work who have suffered such harassment and her experience in training over two hundred and fifty firefighters in New York City regarding the prevention and identification of sexual harassment. 4 T.T. at 94-96.

65. Ms. Wagner expressed her expert opinion that sexually harassing conditions for female employees exist at JSI. Her conclusion rests on the presence of indicators of sexually harassing behaviors and of a sexually hostile work environment, including evidence of a range of behaviors and conditions that are considered sexually harassing, evidence of common coping patterns by individual victims of sexual harassment, evidence of stress effects suffered by those women, evidence of male worker behavior and attitudes, and evidence of confused management response to complaints of sexual harassment. 4 T.T. at 92-93. In reaching her conclusion, she reviewed a variety of depositions of female employees at JSI, defendants' answers to interrogatories and defendants' responses to plaintiff's requests for admissions. Id. at 91. She read these materials for the purpose of identifying these indicators, presuming the truth of the contents of the materials. Id. at 92, 128-30.

66. According to Ms. Wagner, women respond to sexually harassing behavior in a variety of reasonable ways. The coping strategy a woman selects depends on her personal style, the type of incident, and her expectation that the situation is susceptible to resolution. 4 T.T. at 98. Typical coping methods include: (1) denying the impact of the event, blocking it out; (2) avoiding the workplace or the harasser, for instance, by taking sick leave or otherwise being absent; (3) telling the harasser to stop; (4) engaging in joking or other banter in the language of the workplace in order to defuse the situation; and (5) threatening to make or actually making an informal or formal complaint. Id. at 98-102.

67. Of these five categories, formal complaint is the most rare because the victim of harassment fears an escalation of the problem, retaliation from the harasser, and embarrassment in the process of reporting. 4 T.T. at 103-04. Victims also often fear that nothing will be done and they will be blamed for the incident. Id. Thus, the absence of reporting of sexual harassment incidents cannot be viewed as an absence of such incidents

from the workplace. Id. at 169. An effective policy for controlling sexual harassment cannot rely on ad hoc incident-by-incident reporting and investigation. Id. at 169-70.

68. Victims of sexual harassment suffer stress effects from the harassment. Stress as a result of sexual harassment is recognized as a specific, diagnosable problem by the American Psychiatric Association. 4 T.T. at 105. Among the stress effects suffered is "work performance stress," which includes distraction from tasks, dread of work, and an inability to work. Id. at 105. Another form is "emotional stress," which covers a range of responses, including anger, fear of physical safety, anxiety, depression, guilt, humiliation, and embarrassment. Id. Physical stress also results from sexual harassment; it may manifest itself as sleeping problems, headaches, weight changes, and other physical ailments. Id. at 106. A study by the Working Women's Institute found that ninety-six percent of sexual harassment victims experienced emotional stress, forty-five percent suffered work performance stress, and thirty-five percent were inflicted with physical stress problems. Id. at 106.

69. Sexual harassment has a cumulative, eroding effect on the victim's well-being. 4 T.T. at 106-08. When women feel a need to maintain vigilance against the next incident of harassment, the stress is increased tremendously. Id. at 107. When women feel that their individual complaints will not change the work environment materially, the ensuing sense of despair further compounds the stress. Id. at 107-08.

70. Management's perception concerning the scope and range of sexual harassment provides an important indicator of the hostility of the work environment. 4 T.T. at 110. The more subtle forms of sexual harassment, such as sexual comments, sexual teasing, and leering, often fall outside management's perception. Id. As a general proposition, the higher an individual is on the management ladder, the more likely he is to regard sexual harassment as an exaggerated problem and the more likely he is to minimize complaints from women concerning what they perceive to be harassing behavior. Id. at 110-11.

71. Men and women perceive the existence of sexual harassment differently. 4 T.T. at 110-11. Ms. Wagner testified that the differential perception of sexual harassment is borne out by her own experiences and by survey research. A study of federal employees by the Merit Systems Protection Board found that 11 to 12 percent more women than men characterized sexual remarks or materials of a sexual nature in the workplace as sexual harassment. Id. at 163-67. Regarding the second of these categories, which consisted of

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letters, calls and materials of a sexual nature, including materials depicting sexually provocative poses, nude, and partially nude pictures, 67 percent of the women considered the behavior to constitute sexual harassment, in contrast to 79 percent of the men. *Id.* at 167.

72. Male coworkers often fail to see any potential for harassment in their behavior because they believe that only the behavior of supervisors can contribute to a sexually hostile work environment. 4 T.T. at 113-14.

73. Ms. Wagner's testimony provided a credible, sound explanation for the variety of responses to harassing behavior at JSI to which other witnesses testified.[*] Moreover, her framework explains why some women may not feel offended by some behaviors in the workplace that offend other women, *see, e.g.*, 7 T.T. at 206 (testimony of Donna Martin that she was not offended by sexual joking in workplace), and yet the work environment remains hostile to most women.

Defendants' Expert Witness Testimony

74. Dr. Donald Mosher appeared as an expert witness on defendants' behalf to testify in the area of the psychological effects of sexual materials. He is a professor of psychology at the University of Connecticut. He has studied the effects of sexual materials for nearly thirty years. He has authored or coauthored approximately ninety publications, about one half of which concern sexuality and aggression. Dr. Mosher is on the editorial boards of the *Journal of Sex Research* and *Psychology and Human Sexuality*. He has testified as an expert witness in three obscenity trials and before the Meese Commission on pornography. The Court accepted Dr. Mosher as an expert in the area of the psychological effects of sexual materials.

75. Dr. Mosher prepared for his testimony by reviewing Robinson's deposition and all of the visual materials contained in Joint Exh. Nos. 1 through 7. 5 T.T. at 58. He expressed his expert opinion that these pictures do not create a serious or probable harm to the average woman. *Id.* at 61. He based his opinion on the body of scientific literature germane to pornography and on a study which he conducted as part of his preparation. *Id.* at 61-62.

76. Dr. Mosher's own study examined the reaction of 137 college women to the 1989 *Playboy* playmate calendar. 5 T.T. at 63. Eighty-nine of the women also reviewed pinups of nude men taken from *Playgirl*. *Id.* Dr. Mosher employed a seven-point Lippitt rating scale in rating the offensiveness and the degrading quality of the *Playboy* playmate calendar. Dr. Mosher characterized the responses as showing "mild to low moderate in terms of being offensive or degrading." *Id.* at 64-65. The women were asked to place their response in the context of a private setting, a college setting or a work setting. The negative responses rose as the setting moved from private to college to work. *Id.* at 65. In a work setting some women reported that they would find the materials "moderately disgusting and moderately offensive," a result that Dr. Mosher interpreted as "never a seriously negative response." *Id.* Dr. Mosher concluded that this study supported the proposition that females are not adversely affected in their psychological well-being by their exposure to such materials. *Id.*

77. Dr. Mosher additionally testified that research suggests that pinups do not promote sexual aggression by men or induce calloused attitudes toward women. 5 T.T. at 67-68.

78. The Court does not accept Dr. Mosher's ultimate conclusions concerning the impact of sexual materials as pertinent to deciding the issues in this case. Dr. Mosher's study and the studies upon which he relies do not address the matter of workplace exposure to sexual materials under conditions comparable to those existing at JSI. Indeed, Dr. Mosher's subjects viewed the playmate calendars as small groups of women, not as a sole or near sole in a group of men. Dr. Mosher conceded that the element of control is a factor in a woman's reaction to sexual materials. 5 T.T. at 99-100. The more specific studies and observations undertaken by plaintiff's experts deserve greater weight. To the extent that Dr. Mosher's study is valuable, it is because the study suggests the role of context in evaluating the response of women and men to sexually-oriented materials. The relatively greater offense expressed

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[*] In *Lipsett v. University of Puerto Rico*, 740 F. Supp. 921 (D.P.R. 1990), on remand from 864 F.2d 881 (1st Cir. 1988) (rev'g 669 F. Supp. 1188 (D.P.R. 1987)), Judge Pieras denied a motion to qualify Ms. Wagner as an expert witness in a hostile work environment sex discrimination suit. The *Lipsett* case, however, is a jury action and may be distinguished for this reason. For instance, Ms. Wagner's testimony on common patterns and responses to sexual harassment directly informs the inquiry into the effect of the conditions at JSI on the psychological well-being of the hypothetical reasonable woman. Whatever merit lies in the argument that jurors may draw on their common experiences to assess the issue, the Court risks injustice if it attempts to fashion a reasonable woman's reaction out of whole cloth. The general rule applied, particularly in nonjury cases, is that "the decision by a trial court on the competency of, and what weight should be given to the testimony of, an expert is a highly discretionary one." *IMPACT v. Firestone*, 893 F.2d 1189, 1195 (11th Cir.), cert. denied, 111 S. Ct. 133 (1990). This Court is satisfied that the potential sources of bias, strengths, and weaknesses in Ms. Wagner's qualifications and testimony have been considered fully.

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concerning sexual materials in the workplace tends to support the propositions put forward by plaintiff's experts.

79. Dr. Joseph Scott appeared as an expert witness on defendants' behalf to testify in the area of the effects of sexual materials on behavior and generally on men and women. Dr. Scott is an associate professor in the Department of Sociology of Ohio State University. He has published approximately forty articles in professional journals and three books, with a fourth book in progress. He received some of his training at the Kinsey Sex Institute as a National Institute of Mental Health fellow. He has received honors from the Western Society of Criminology and the American Society of Criminology. He has been an expert witness in many obscenity trials. A controversial methodology used by Dr. Scott in some obscenity trials, ethnography analyses, has been criticized by some courts, but Dr. Scott stated that his testimony in this case did not rest on any studies using this methodology. Dr. Scott has done contract work paid for by the publishers of what he called "male sophisticate magazines," that is, Playboy, Penthouse, Hustler, and the like; he would not disclose further details on such research but he did give assurance that his opinions did not rest on any of these studies. The Court accepted Dr. Scott as an expert as offered.

80. Dr. Scott prepared for his testimony by reviewing Robinson's deposition and the visual materials contained in Joint Exh. Nos. 1 through 7. 5 T.T. at 129-30. He expressed his expert opinion that "the average female would not be substantially effective [sic] in a negative manner" by the materials, that is, she would not take offense at them. Id. at 130-31. He further stated that women in the workforce would be slightly more offended by such materials than men. Id. at 131. He based his opinion upon surveys which he conducted himself and surveys conducted by other people on the effects of sexual materials. Id. One of the studies upon which he relied is a study of the offensiveness to the raters of the contents of Hustler magazine. Id. at 108, 131.

81. Dr. Scott described the Hustler study as his only workplace setting study. 5 T.T. at 118. In that study the females rated the cartoons and the pictorials to be less offensive than the males did, id. at 131-32, although the level of offensiveness was low for both groups, id. at 135. The methodology of the study, however, diminishes its application to the workplace. The subjects were twelve college student volunteers, six men and six women. Id. at 141. They viewed the materials at their own leisure, alone or at their own table in a room with three tables. Id. at 140-41. The primary focus of the study was the content of the pictures and cartoons, not the reactions of the individuals. Id. at 143. Dr. Scott's testimony about the offensiveness of sexual materials to working women relies on survey results in which individuals are questioned about their attitudes toward such materials and this information is correlated with their employment status and gender. Id. at 137-38.

82. Dr. Scott testified that no research of which he is aware indicates that exposure to sexual materials similar to Joint Exh. Nos. 1 through 7 will prompt males to act more aggressively or threateningly toward females. 5 T.T. at 138. Under cross-examination Dr. Scott admitted his lack of familiarity with one researcher's work that reached results contrary to his conclusion. Id. at 147-50.

83. The Court does not accept Dr. Scott's expert testimony as useful to the determination of the issues in this case. His opinions provide a basis for evaluating the offensiveness of sexual materials in the abstract only. The important element of context is missing; the sexually harassing impact of the materials must be measured in the circumstances of the JSI work environment. Dr. Scott's testimony does not assist in this effort.

Defendants' Social Context Evidence

84. Defendants introduced into evidence several examples of magazines often purchased by women in which complete or partial nudity, sexual cartoons, and sexually frank articles appear. See D. Exh. Nos. 13 (Cosmopolitan, Sept. 1987), 14 (Glamour, Sept. 1987), 15 (Ms., Sept. 1987), 16 (Vanity Fair, Oct. 1987). Dr. Scott testified that the sexual explicitness of these magazines reflects a recent trend for "women's magazines." 5 T.T. at 134. In addition, a picture of a statue in the Duval County Courthouse, in which a female figure's breasts are exposed, was introduced into evidence. D. Exh. No. 4.

85. Defendants also solicited evidence about the conditions at two other shipyards, Norfolk Shipbuilding and Drydock Corp. (NORSHIPCO) and Colona Shipyard. Harvey Williams worked in employee relations positions at both facilities (NORSHIPCO from 1958 to 1982 and Colona from 1986 to 1988) and testified about his experiences. NORSHIPCO is comparable in size to JSI while Colona is considerably smaller. Both have workforces in which approximately 10 to 15 percent of the employees are female. Pictures of nude and partially nude women are posted in the shops and locker rooms, but no complaints about the pictures

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were filed at either site during Williams' tenure. 6 T.T. at 53-62. Williams did not provide any other details concerning the work environment at these shipyards.

86. For the reasons stated in Conclusions of Law ("COL") ¶ 15, the Court finds that the "social context" evidence has little to no value in determining the issues of the case. If that type of evidence were material, the Court finds considerable weakness in defendants' presentation. The magazines introduced into evidence do not form a basis to suggest the extent to which sexually frank or sexually explicit materials are accepted by women; no circulation figures were introduced and no evidence suggests the acceptance of the sexually frank material by female subscribers or readers. The absence of formal complaints at NORSHIPCO and Colona does not tell whether their work environments are hostile; plaintiff's expert witnesses testified that a lack of complaints does not indicate the level of hostility. Moreover, the professional relations between men and women may be otherwise so favorable that the presence of sexually-oriented pictures does not threaten the relationship; the percentage of women in the workforces at both shipyards is much higher than at JSI. Because of these weaknesses, the Court finds the social context evidence inadequate to draw reliable conclusions concerning the reaction of women to sexually-oriented pictures in the workplace.

JSI Responses to Sexual Harassment Complaints

Sexual Harassment Policy from 1980 to 1987

87. JSI adopted its first policy dealing specifically with sexual harassment in 1980. It was part of a policy statement from an executive vice-president of JSI titled "Equal Employment Opportunity," dated June 17, 1980. D. Exh. No. 9. It stated, in pertinent part:

> we should all be sensitive to the kind of conduct which is personally offensive to others. Abusing the dignity of anyone through ethnic, sexist or racial slurs, suggestive remarks, physical advances or intimidation, sexual or otherwise, is not the kind of conduct that can be tolerated.
>
> If any employee feels that they are [sic] the object of such conduct, it should be reported immediately to the EEO coordinator at this facility.

Id. This policy statement was apparently posted in all shops and offices at both the Commercial Yard and the Mayport Yard and near the time clock at the Mayport Yard. P. Exh. No. 1/A-1/F (answer to question 12(b)); 6 T.T. at 158-60; 8 T.T. at 156-57.

88. This policy fell short of effectiveness in several respects. The EEO coordinator was not named and the identity of the person was not widely known. See 1 T.T. at 137; 4 T.T. at 41. JSI did not distribute the policy commensurate with other important company policies. For example, the standard JSI rule book, Jt. Exh. No. 12, did not incorporate the policy, 6 T.T. at 186, although this book is the source for the rules upon which employees rely to govern their conduct in the workplace, see Turner Depo. at 61-62, 71-72. While safety policies sometimes are distributed with employee daily time cards, 6 T.T. at 141, the sexual harassment policy did not receive such distribution. Prior to April 1987, many employees and some of the defendants (defendants admitted to Owens' lack of knowledge) were unaware of the sexual harassment policy. See, e.g., 1 T.T. at 136 (Robinson); 4 T.T. at 40-41 (Albert); Kiedrowski Depo. at 10.

89. The handling of several sexual harassment complaints between 1980 and 1987 illustrates the ineffectiveness of the policy.

(a) When Banks suffered harassment from a rigger, John Fraser, on a company bus, see supra FOF ¶ 34(e), she initially complained to Sharpe, the rigging leaderman. Banks testified that Sharpe placed his arm around her shoulder and said, "Well, don't worry about it. Let me blow in your ear and I'll take care of anything that comes up." 3 T.T. at 52-68. The latter phrase refers to a sophomoric shipyard joke involving a man's erection. *Id.* at 58; McMillan Depo. at 138-39. Banks was summoned to a meeting the next day at which Fraser demanded an apology for Banks' profanity directed at him in response to his harassment. Herbert Kennedy, a foreman present at the meeting, interrupted an emotionally distraught Banks and told her to shut up, stop crying, return to work, or face being fired. 3 T.T. at 60-68; 5 T.T. at 186-88. Fraser was not reprimanded for his behavior. Kennedy conducted a cursory investigation of Banks' complaint about Sharpe, but the investigation was limited to a conversation with Sharpe and those witnesses suggested by Sharpe. Kennedy did not request the names of prospective witnesses from Banks. Based on the limited investigation, Kennedy determined that Sharpe had not committed any misconduct. 7 T.T. at 99-108, 111-13.

(b) When Banks endured harassment from a rigger named Hawkins in the form of a humiliating comment from him, see supra FOF ¶ 34(d), Banks complained to the assistant welding foreman, John Nicholas. Nicholas testified that he was an appropriate person to hear her complaint on the matter. 7 T.T. at 238-39. Banks testified that when she complained to Nicholas, he thought the comment was funny, 3 T.T. at 47-48; Nicholas testified that when Banks repeated the offensive comment to him, he "probably grinned." 7 T.T. at 230. Banks felt deterred from further pursuing the matter as a result of Nicholas' reaction. 3 T.T. at 161.

(c) When Robinson suffered abusive language from a shipfitter, George Nelson, see supra FOF ¶ 28, her complaint to her supervisor, assistant welding foreman John McLean, resulted in an informal conversation between McLean and Nelson. McLean, however, took no steps to document his actions and did not report the fact of the complaint to Nelson's superiors in the shipfitting department. 7 T.T. at 143-47.

(d) When Karen Gamble ("Gamble"), a paint and labor shop employee at the Mayport Yard, lodged a formal complaint with Stewart, the ensuing investigation reflected a lack of appreciation for the seriousness of the complaint. According to the memorandum introduced into evidence by defendants, D. Exh. No. 24, Gamble initially reported her complaint

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concerning unwanted sexual remarks and touching by a male coworker to her leaderman, who then spoke to the male coworker. The leaderman explained his actions to Gamble and told her if she was not satisfied, she could register a complaint with the foreman. Gamble took the matter to Stewart, who contacted Ahlwardt, who in turn delegated investigatory responsibility to E.E. Hasley, an assistant night shift superintendent. See 8 T.T. at 187-88. Hasley gathered together Gamble, the male coworker of whom she complained, her foreman and two leadermen. Hasley had each person concerned recount the circumstances. Thereafter, he suggested the matter be settled there "as amicably as possible." He further suggested that an apology should suffice, and the offender apologized. Gamble accepted the apology, and the foreman asked her to repeat her acceptance. Hasley warned the offender against future misconduct and the foreman gave him a verbal warning. Hasley's memorandum, D. Exh. No. 24, was not placed in the offender's personnel file, 8 T.T. at 189, and the record does not indicate any other documentation of the events in his file. The most striking aspect of the handling of Gamble's complaint, however, is the urging by a high management official that she accept an apology as full settlement of her complaint, under circumstances that exerted great pressure on her to follow this management suggestion, when she had indicated through her formal complaint that she was unsatisfied with informal steps of the same kind taken by her leaderman.

90. The failure to document complaints of sexual harassment is commonplace at JSI. The company has no system to record concerns raised about sexual harassment; no instructions to document harassment complaints have been given to leadermen, quartermen, foremen, or superior management employees. 8 T.T. at 14-16. This gap in the sexual harassment policy left higher management unaware, until the prosecution of this lawsuit, of the fact that one JSI employee, Morris Green, had twice been the subject of complaints from female employees to lower level management employees about Green's lewd, sexual behavior at work. 8 T.T. at 27-28, 46-47. Both foremen to whom the complaints were made told Green that a further offense would result in discipline, but neither foreman disciplined him (even though he admitted the offenses and the second foreman was aware of the prior complaint). McMillan Depo. at 122-29; Wingate Depo. at 46-49.

91. Female employees lacked confidence in the willingness and commitment of JSI to take steps to halt sexually harassing behavior. Consequently, Robinson, Banks, and Albert adopted personal strategies for coping with the work environment. Robinson, for instance, declined to complain about degrading pictures and comments at the beginning of her employment because she feared that she might be subjected to retaliation and that the complaints would not be well-received. 1 T.T. at 82-86. These findings of fact bear out the validity of her fears. Banks also declined to complain about many instances of harassment because she feared ridicule and she felt that management would not take effective steps to remedy the situation. 3 T.T. at 32-34, 48-49, 61-62, 95-96, 98, 147-48. Albert perceived that no discipline would be meted out against offending male employees, so she handled the situations as they arose in her own fashion, often using "smart remarks" directed to the harasser. 4 T.T. at 27-28, 33-40.

Quartermen and Leadermen

92. Quartermen and leadermen are perceived as appropriate persons to whom to complain about work environment problems. Robinson lodged complaints about sexually oriented pictures with Robert Fields ("Fields"), a quarterman in the welding shop at the Mayport Yard, 8 T.T. at 116-19, with Danny Miracle, a leaderman in the shipfitters' shop at the Mayport Yard, id. at 69-71, with Donald Furr ("Furr"), a leaderman in the welding shop at the Commercial Yard, 5 T.T. at 158-60, and with Kiedrowski, 8 T.T. at 91-92. Banks also lodged a harassment complaint on one occasion with a leaderman in the rigging shop at the Mayport Yard, 7 T.T. at 117, and on another occasion with Kiedrowski, 8 T.T. at 94-95. Gamble initially complained to her leaderman after a coworker made inappropriate sexual remarks and touched her body. D. Exh. No. 24. In response to a question asking to whom Robinson should have complained about work environment problems, Furr, her leaderman, testified, "I reckon I'm the one to start with." 5 T.T. at 173.

93. Quartermen and leadermen have exercised apparent authority to respond to complaints of sexually harassing behavior, have acted as conduits for the relay of complaints to higher management, and have received explicit instructions concerning their authority to exercise discretion to control the work environment. Examples of each appear in the testimony. Dan Cooney ("Cooney"), a quarterman in the shipfitters' shop at the Mayport Yard, testified that he directed a leaderman to paint over the "Men Only" sign on his own authority. 7 T.T. at 87-89. (Although conflicting testimony suggests that Cooney received an instruction from a foreman to paint over the sign, Cooney's testimony is significant for his assertion that he possessed the authority to take such action independently.) Fields and Furr each testified to instances in which they took steps to cover over offensive graffiti or pictures after a complaint from Robinson. 8 T.T. at 117-18 (Fields); 5 T.T. at 158-59 (Furr). Both men also testified to instances in which they passed along a complaint to someone higher in management. 8 T.T. at 118-19 (Fields relayed complaint about coworker to foreman); 5 T.T. at 158 (Furr relayed complaint about calendar to shift superintendent). Cooney mentioned an

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occasion when he received a directive from Lovett to remove pictures and move a calendar. 7 T.T. at 70-73. Fye explained that he sought out his assistant foreman to ascertain the extent of his authority to remove pictures and the like when Robinson complained, and he was told to take whatever actions made her comfortable. 6 T.T. at 170-73. Kiedrowski asserted that, as a leaderman, he possessed the authority and had the responsibility to direct welding department employees to stop reading magazines containing pictures of nude or partially nude women on the job and to get rid of the magazines. 6 T.T. at 108. In the case of Gamble's complaint concerning sexual remarks and touching by a coworker, the assistant night shift superintendent listed among his remedial actions that he directed her leaderman "to keep a closer eye on his crew and not to let the bantering get out of hand." D. Exh. No. 24. This directive suggests a belief by management that leadermen are responsible, in part, for control of the work environment.

Sexually-Oriented Pictures

94. Complaints about the pictures of nude and partially nude women yielded little success. On some occasions pictures were removed but subsequently were posted again or like pictures were posted in their place. *See, e.g.*, 3 T.T. at 100-03; 6 T.T. at 69-71. Even a complaint by a male shipyard worker, David Cato, who expressed concern about the visibility to visiting family members of Navy personnel of some pictures in a JSI shop trailer, went unheeded. 6 T.T. at 179-81. In one instance, a calendar about which Robinson complained was merely moved from one wall to another on the assumption that the lower visibility of the objectionable pictures would adequately address the complaint of sexual harassment. 6 T.T. at 137. On another occasion, Robinson's complaint was addressed by transferring her from the Mayport Yard. 1 T.T. at 73. On yet another occasion, when Robinson attempted to lodge a complaint with Lovett by phone, the administrative clerk in Lovett's office ignored her complaint and shifted the conversation to a criticism of her lack of respect for Lovett (because she did not ask for him as "Mr. Lovett") and of her absence from her assigned work area. 8 T.T. at 181-83.

95. The display of pictures of, and calendars featuring pictures of, nude and partially nude women was left to the discretion of the foremen of the respective shops. *See* 6 T.T. at 146-48. The evidence shows only one foreman, Ben West of the outside machine shop at the Mayport Yard, ordered the pictures of nude and partially nude women, whether pinups or calendars, off his shop's walls. This bold action, however, was attenuated by the replacement of the calendars bearing nudes with calendars showing women in provocative swimwear. 4 T.T. at 60-61.

Robinson's January 1985 Complaints (Events Precipitating Lawsuit)

96. The present lawsuit stems from Robinson's complaints in January 1985 that pictures of nude and partially nude women were posted in the toolroom trailer and in the shipfitters' trailer aboard the *U.S.S. Saratoga* at the Mayport Yard. (Her complaint regarding the shipfitters' trailer concerned a calendar with pictures of nude and partially nude women on it, Jt. Exh. No. 2, and other pictures.) Robinson was assigned to work with the shipfitters; she checked out welding equipment from the toolroom trailer on a daily basis. Robinson initially complained to Kiedrowski, her leaderman and the most senior person in the welding department aboard ship, 8 T.T. at 97, and later to Fred Turner ("Turner"), the welding department foreman.

97. Kiedrowski's reaction to Robinson's complaint to him left her feeling embarrassed. 1 T.T. at 31-32. At trial, Kiedrowski described these events with a specificity that included a denial that he responded to Robinson's complaint with a loud "wow," but his testimony lacks credibility when contrasted with his denial in his deposition testimony that he recalled anything about the event. Robinson observed that one of the pictures in the toolroom trailer about which she complained, a color photograph of a nude blond woman, was removed shortly after her complaint to Kiedrowski; another picture in the toolroom trailer, a black and white photograph, remained posted for several more days. *Id.* at 33. Kiedrowski disclaimed any ability to assist Robinson in securing removal of the calendar in the shipfitters' trailer. 8 T.T. at 91. Kiedrowski also told Robinson that she had no business in the shipfitters' office. 8 T.T. at 92. The basis for his scolding her on this point is unclear; Kiedrowski had previously assigned Robinson to work with the shipfitters on occasion, Kiedrowski Depo. at 32, and, when he worked as a welder, he had occasion to enter the shipfitters' office himself. 8 T.T. at 103-04.

98. In the case of Turner, Robinson approached him and expressed her complaint over the "pornography" she had seen. Turner responded, "the what?" Robinson repeated the term "pornography" three times before Turner acknowledged that he understood that she was referring to the pinup and calendar pictures in the shipyards. 1 T.T. at 29-30. Turner testified

that he directed his leaderman (Kiedrowski), his quarterman (Harris), and Banks to make the rounds of the shops aboard the U.S.S. *Saratoga* and remove any pinup pictures. 8 T.T. at 75-77. He did not direct the removal of any calendars bearing pictures of nude or partially nude women. *Id.* at 80. While Turner received a report from his group that the offending pictures had been removed, deposition and trial testimony by Owens indicate that either some pictures were missed or new pictures were posted after Turner's order. 6 T.T. at 129-30; Owens Depo. at 132-33.

99. Dissatisfied with the response within her own department, Robinson approached Edenfield, a shipfitting leaderman, to complain. 1 T.T. at 26. Edenfield told her to go back to her own office. 7 T.T. at 165-66. Robinson felt trivialized by his response. 1 T.T. at 36.

100. Robinson then telephoned Lovett, the shipfitting foreman, to complain. Lovett advised Robinson he would "look into it," but he did not subsequently speak to her about it again. 1 T.T. at 36-37; 8 T.T. at 137-38. Robinson had requested that the calendar be removed, but Lovett did not grant the request. Lovett testified that he instructed Cooney to move the calendar about which Robinson complained so that the calendar was no longer visible from outside the trailer. 8 T.T. at 137. Cooney relayed the instruction to Leach, who carried it out. 7 T.T. at 70-72. Lovett stopped by the trailer the next day to confirm that his instruction had been followed.

101. Robinson's complaints became common knowledge around the shipyards and the catalyst for a new wave of harassing behavior directed against her and other women. Banks asked Robinson at one point to cease in her shop-to-shop complaints because the male employees made a joke of it, laughed at Robinson openly, and had begun to bring in "hard pornography" that they showed to female workers. 3 T.T. at 92. Many specific incidents of sexually harassing behavior arising at this time are set forth *supra* in these findings.

102. A "Men Only" sign appeared on the door to the shipfitters' trailer after the calendar was moved. The sign was comprised of letters approximately six inches high and was written in white paint on a brown door. Cooney saw the sign and, on Lovett's order, painted over it with red paint. 7 T.T. at 73-84; 8 T.T. at 139-40. Ahearn observed the sign as painted over, and directed that it be painted over again because it was still visible. 6 T.T. at 177. The legend remained visible as painted the second time. See D. Exh. No. 3A, 3B, 3C (photographs of door after painting, taken two years later). Robinson first observed the "Men Only" sign on January 18, 1985, before it was painted over. 2 T.T. at 118. She walked to the shipfitters' office to examine it more closely and, while she was there, peered inside the trailer, discovering that the calendar about which she complained was still posted. 1 T.T. at 38-39. Edenfield spotted Robinson "snooping" in the trailer and told her to go away because she had no business there. 7 T.T. at 165-66, 169-73. Robinson complained to Kiedrowski about the sign, but he advised her that it would be replaced by an "Authorized Personnel Only" sign. 1 T.T. at 53. The following day the sign was covered with a cardboard covering. 2 T.T. at 124-25. Two days later, however, the covering was removed and the sign had been painted over with red paint that failed to completely obscure its message. 2 T.T. at 125-26; 3 T.T. at 21.

103. Robinson decided to make a formal complaint about the discriminatory sign and the continuing presence of the pictures of nude and partially nude women. On January 23, 1985, Robinson met with Owens, Turner and Chief Shop Steward Quentin McMillan ("McMillan") to complain about the pictures. En route to Owens' office for the meeting, Robinson observed several pictures on the wall and a lewd comment was directed at the woman escorting Robinson to the office. Robinson told the men at the meeting that she felt the pictures were degrading and humiliating to her, that they nauseated her, and that she wanted them removed. She complained about the "Men Only" sign and told the men that the sign and pornography constituted discrimination, promoted harassment, and were harassment.

104. Owens told Robinson that the company had no policy against the pictures, which had been posted throughout the shipyards for at least nineteen years. 6 T.T. at 128; 1 T.T. at 59. Owens asserted that the nudity on television was as bad as the pictures at JSI and she should look the other way just as she would turn off the television if she were offended. 6 T.T. at 142-43. He told her that she chose the JSI work environment and that the men had "constitutional rights" to post the pictures. *Id.* at 128. He would not order the removal of the pictures. He told Robinson she had no business going into the shipfitters' trailer, but he would have the sign removed because JSI had "lady shipfitters." *Id.* at 128. Owens made it clear to Robinson that the shipyards were a man's world and that the rules against vulgar and abusive language did not apply to the "cussing" commonly heard there. 1 T.T. at 59-60. She asserted, in response to a question, that she been verbally harassed more often than she could count, *id.* at 60, but his definition of sexual harassment did not

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bring her complaint into its scope. See 6 T.T. at 149-50 (Owens' definition of sexual harassment).

105. Owens did not investigate the details of Robinson's complaints. He directed that the "Men Only" sign be painted over, but he did not initiate any investigation to determine who perpetrated the deed. 6 T.T. at 153. He did not take any opportunity to view the calendar about which Robinson complained. Id. at 151. He told the Mayport Yard foreman at a meeting shortly thereafter that pictures showing sexual intercourse should be removed, but pictures of nude or partially nude women could remain. Id. at 148-49. He specifically directed the foreman to leave up vendors' advertising calendars such as Joint Exhibit Nos. 1 through 5, some of which he had observed in various locations in the backyard compound after Robinson's complaint to him. Id. at 146-47.

106. Robinson next took her complaint to Ahlwardt, Owens' superior at the Mayport Yard. On January 23, 1985, Robinson called Ahlwardt and told him of her complaints to Owens regarding the pictures and the "Men Only" sign. Robinson testified that after she explained the course of events involving her complaint to Owens and her desire to have the pictures removed, Ahlwardt stated that he would not order the pictures removed. 1 T.T. at 68. Defendants initially admitted Robinson's version of Ahlwardt's reaction but Ahlwardt denied at trial that he had told Robinson that he would refuse to remove the pictures. 6 T.T. at 194. The admission is binding and the Court credits Robinson's description of Ahlwardt's reaction. Ahlwardt, however, agreed to meet with Robinson to discuss her complaints.

107. Prior to meeting with Robinson, Ahlwardt made several phone calls. He contacted supervisors at the Commercial Yard to determine whether the pictures to which Robinson objected were present there also. Earl Day, a machinery superintendent at the Commercial Yard, confirmed that pictures of nude or partially nude women were on display in that workplace. Ahlwardt Depo. at 114-16. Ahlwardt learned from Harry Wingate, a hull superintendent at the Commercial Yard, that such pictures were "all over the place" there.

108. Ahlwardt also spoke to two persons in policymaking positions. He called Stewart to discuss whether JSI had a policy forbidding the posting of pictures such as those about which Robinson complained. He told Stewart that a "breast shot" was at issue. Stewart told Ahlwardt that no policy prohibited such pictures, that Robinson's complaint was baseless, and that the calendars and pictures should be left alone. 6 T.T. at 164-65. Thereafter Ahlwardt spoke to Brown. Brown likewise expressed his opinion that the materials should not be removed and that Robinson's complaint lacked merit. Brown specifically instructed Ahlwardt that an order prohibiting the display of pictures of nude and partially nude women should not be issued. 6 T.T. at 201-03. Neither Stewart nor Brown conducted any investigation of Robinson's complaint prior to rendering advice to Ahlwardt.

109. Following these phone calls, Ahlwardt met with Robinson. Also present at the meeting were Turner, McMillan, and Barbara Dingle, a union secretary who worked as a mechanic. Robinson did not ask for the presence of union representatives; those individuals appeared at Ahlwardt's request. Robinson initiated the conversation by requesting the removal of the offending pictures and calendars. She explained her position, including her representation that other women at JSI took offense at the presence of the pictures. Ahlwardt replied that he did not know of any "pornographic" pictures in any offices or shops at the Mayport Yard; his definition of pornography is limited to pictures depicting intercourse, masturbation, or other sexual activity. 6 T.T. at 208. Robinson pressed her point by referring to the company rule against obscenity. Ahlwardt belittled her concern by looking up the term in a dictionary and dismissing it as vague. 1 T.T. at 69. Ahlwardt further told Robinson that nautical people always had displayed pinups and other images of nude or partially nude women, like figureheads on boats, and that the posting of such pictures was a "natural thing" in a nautical workplace. Ahlwardt opined that there was nothing wrong with pinups in the shipyards, that he himself previously had posted such pictures, 1 T.T. at 69, and that they certainly were not intended to intimidate, embarrass or cause concern for anyone. 6 T.T. at 173. Robinson attempted to raise a comparison between the effect of pornography on women and the effect of Ku Klux Klan propaganda on black people, 1 T.T. at 69-70, but Ahlwardt dismissed the comparison with the retort that there were Klan members working in the shipyards, id. at 70; 6 T.T. at 175. The focus of the meeting then shifted to an inquiry whether Robinson had been physically assaulted or sexually propositioned in the course of her work. 2 T.T. at 134-38. Robinson stated she had not been harassed in those manners, but she considered the pictures to be harassment and to promote harassment. Id. at 138; 6 T.T. at 169.

110. Ahlwardt complimented Robinson on her high morale. 1 T.T. at 71. He then asked Dingle if she took offense at the pictures, to which Dingle answered that she did not.

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6 T.T. at 173. Dingle suggested that Robinson was spending too much time attending to the pictures and not enough time attending to her job. Id.; McMillan Depo. at 101. McMillan asserted that the shipyards were "a man's world" and therefore men are going to post pinups. McMillan Depo. at 88-89.

111. Turner was first to leave the meeting. He stated the problem was taken care of because he was transferring Robinson to the Commercial Yard. 1 T.T. at 73. Robinson left thereafter, visibly upset from the encounter. 3 T.T. at 91-92; McMillan Depo. at 110-11; see 1 T.T. at 79 (Robinson's testimony of how upset she was). Robinson received the transfer downtown.

112. Following the meeting with Robinson, Ahwardt instructed Owens not to issue any prohibition of pictures of nude and partially nude women in the workplace. Ahwardt took no action of his own to remove any pictures, although he visited the shopfitters trailer the next day, when he was scheduled to be aboard the U.S.S. Saratoga to observe the Whiden valve calendar. 6 T.T. at 176-77.

113. Robinson testified that she filed a union grievance about the pictures and the "Men Only" sign. 1 T.T. at 79. She further testified that the third-shift shop steward told her that the grievance was pulled -- withdrawn by the union leadership. Id. at 80. The vice-president of the union at that time, Larry Yeomans, testified that, to his knowledge, no such grievance was filed or pulled. 6 T.T. at 224. The Court credits the testimony of Robinson. An account of the events at issue drafted by her contemporaneously with the incident, see Jt. Exh. No. 10, at 18-19, is consistent with her testimony and it was written at a time and for a purpose that do not suggest a motive for fabrication.

114. The Court further finds that use of the grievance procedure would have been futile for Robinson. The chief steward at the Mayport Yard, McMillan, considered the pictures to be acceptable; indeed, he recounted his statement to Owens that he would grieve any rule banning the pictures as an infringement on the freedom of expression of male shipyard workers. McMillan Depo. at 88. Further, since the offensive pictures originated in the conduct of the majority of the bargaining unit members, it is unrealistic to expect the union to press for sanctions. Moreover, the supervisory personnel who would rule on the various steps of the grievance, Lovett, Owens, and Stewart, clearly expressed their unwillingness to take action against the posting of sexually-oriented pictures in the shipyards.

115. Robinson filed her complaint with the Jacksonville Equal Opportunity Commission ("JEOC"), an authorized state referral agency. Jt. Exh. No. 9. A wide range of behavior was alleged in her complaint, including exposure to the above-described pictures, exposure to sexually suggestive and humiliating comments, and the "Men Only" sign. Robert Kimbrough from JEOC visited JSI, spoke with Ahwardt, Owens, and Stewart, and conducted a walk-through in some areas of the shipyard to observe the pictures in those places. 6 T.T. at 170-72, 187-88. Robinson subsequently received a right to sue letter from the Equal Employment Opportunity Commission, together with a determination that no reasonable cause existed to believe that "she was discriminated against . . . by being subjected to sexually explicit pornography and harassment because of her sex, female." D. Exh. No. 6. The Court places little weight on the "no cause" determination because the investigation apparently was cursory and the only decided case relevant to the issue at that time, Rabidue v. Osceola Refining Corp., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), may have provided the misleading impression that Robinson had not raised an actionable claim.

116. On September 2, 1986, within ninety days of her receipt of the right to sue letter, Robinson filed the present lawsuit. The parties and claims were adjusted in the second amended complaint filed herein on May 8, 1987.

1987 *Sexual Harassment Policy*

117. In April 1987, during the pendency of this lawsuit, JSI adopted a new sexual harassment policy. It was instituted unilaterally, without consulting or bargaining with the union. See McMillan Depo. at 118-19. The official policy statement, signed by Vice-President for Operations Larry Brown, endorses the following policy:

> 1. It is illegal and a violation of Jacksonville Shipyards, Inc., Policy for any employee, male or female, to sexually harass another employee by
>
>   a. making unwelcomed sexual advances or request for sexual favors or other verbal or physical conduct of a sexual nature, a condition of an employee's continued employment, or
>
>   b. making submission to or rejection of such conduct the basis for employment decisions affecting the employee, or
>
>   c. creating an intimidating, hostile, or offensive working environment by such conduct.
>
> 2. Any employee who believes he or she has been the subject of sexual harassment, should report the alleged act immediately to John Stewart, Ext. 2716 in our Industrial Relations Department. An investigation of all complaints will be undertaken immediately. Any supervisor, agent or

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> other employee who has been found by the Company to have sexually harassed another employee will be subject to appropriate sanctions, depending on the circumstances, from a warning in his or her file up to and including termination.

D. Exh. No. 10. This policy is virtually verbatim a model policy distributed by JSI's parent corporation. P. Exh. No. 55. The model policy was part of an industrial relations newsletter which contained an article on sexual harassment. Stewart read the newsletter in the normal course of his job. 8 T.T. at 186. The article on sexual harassment, authored by the manager of employee services at the corporate headquarters, stated that among the "conditions or items in the work environment" that an employee may find offensive on the basis of the employee's sex are "'subtle' forms of harassment like: dirty jokes, sexually offensive pictures, leers or glares, sexual innuendoes, wolf whistles or cat calls, etc." P. Exh. No. 55 at 5. The article further cautioned that coworkers and peers might create the hostile work environment. The article observed that the problem of whether offensive conduct is "unwelcome" cannot be determined from an offended employee's failure to complain because the employee might not know how to react, or where to seek help, so the offending employees may continue the behavior under the mistaken impression that it is welcome. The article referenced the model policy and its inclusion of the author's name and telephone number as an alternative avenue for complaints where an employee feels unable to complain to the industrial relations department representative. JSI's policy did not include any alternate person to receive complaints. A final point made by the article was that the standard for conduct had to come from the top. "Our defense is stronger if the pictures are not there at all than to argue that they are in an area where the employee shouldn't have been. Rather than asking if the employee would be offended by the joke, don't tell it at all." Id. JSI's policy did not incorporate this advice.

118. The new policy was distributed solely through posting on the bulletin boards in the shops and the general bulletin boards. 8 T.T. at 174-75. It was not incorporated into the General Safety Instruction and Company Rule Book, the contract book, the affirmative action plan, or on the EEO posters. Id. at 189.

119. The 1987 policy had little or no impact on the sexually hostile work environment at JSI. Employees and supervisors lacked knowledge and training in the scope of those acts that might constitute sexual harassment. For example, Henry Starling, night shift superintendent at Commercial Yard, testified that he received no training and that he had no idea what is meant by the phrase sexual harassment, 7 T.T. at 34-35, and John Nicholas, assistant foreman in welding shop at Commercial Yard, also testified that he lacked instruction concerning sexual harassment, id. at 233-34. The pictures of nude and partially nude women remained posted throughout the workplace. In fact, in January 1988, after the issuance of the new policy, Stewart objected strongly when O.C. McBride, a superintendent at the Mayport Yard, removed three *Playboy*- and *Penthouse*-style calendar pictures from the shipfitters' shop and the electrical shop in anticipation of a tour of the shipyards conducted by Stewart. 7 T.T. at 53-60. The naming of only one company representative, Stewart, to hear sexual harassment complaints diminished the policy's value to an employee, such as Robinson, whose prior experiences with Stewart left her without confidence in his willingness to handle such complaints. 1 T.T. at 137.

120. The Court finds that the policies and procedures at JSI for responding to complaints of sexual harassment are inadequate. The company has done an inadequate job of communicating with employees and supervisors regarding the nature and scope of sexually harassing behavior. This failure is compounded by a pattern of unsympathetic response to complaints by employees who perceive that they are victims of harassment. This pattern includes an unwillingness to believe the accusations, an unwillingness to take prompt and stern remedial action against admitted harassers, and an express condonation of behavior that is and encourages sexually harassing conduct (such as the posting of pictures of nude and partially nude women). In some instances, the process of registering a complaint about sexual harassment became a second episode of harassment.

Remedial Aspects

121. Plaintiff seeks injunctive relief to force JSI to implement a comprehensive, effective and enforced sexual harassment policy. She also seeks make-whole relief for financial loss she alleges she suffered due to the harassing work environment. The components of the loss include days of absenteeism taken to recover from or to avoid the work environment, foregone opportunities for overtime and howday pay, and passed opportunities for advancement through certain welding certification tests. She additionally seeks expungement of warnings she has received for excessive absenteeism.

122. Ms. Wagner, plaintiff's expert whose expertise on education and training to combat sexual harassment was accepted without objection, testified regarding the elements

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of a comprehensive, effective sexual harassment policy. See 4 T.T. at 115-24. In her experience and according to the research conducted in this field, sexual harassment can be eliminated through a program that trains key supervisors how to investigate sexual harassment complaints, that teaches male and female employees what conduct is prohibited, and that includes a strong policy statement signed by a top-ranking company executive. The training of key supervisors in investigatory techniques encourages active monitoring of the environment and relieves some barriers to reporting of sexual harassment by placing the burden on management. The policy statement should: (1) describe with specificity the behaviors that constitute sexual harassment; (2) advise employees that sexual harassment may result from the behavior of coworkers as well as the behavior of supervisors; (3) promise and provide confidentiality and protection from retaliation for complainants and witnesses; and (4) provide a number of avenues through which a complaint may be initiated. The policy statement must receive wide, effective distribution.

123. Plaintiff proposed a remedial sexual harassment policy in her pretrial briefs. Ms. Wagner examined this policy and concluded that it contains all of the important features of an effective policy implementation procedure and training program. 4 T.T. at 126.

124. The Court finds that the evidence fully supports the appropriateness of injunctive relief in the nature of that requested by Robinson. Because defendants have not provided detailed comment on the proposed policy, the Court will permit a brief period of time for the parties to consult regarding any modification that they may deem appropriate to secure maximum success of the policy and the procedures at JSI and for defendants to register with the Court any objections to the policy that concern JSI's ability to implement the policy in a fashion consistent with the remedial goals expressed herein.

125. Regarding lost days of work, Robinson testified that she missed several days each year because she could not face entering the hostile work environment. 1 T.T. at 156-57. She did not identify this as the reason for her absenteeism when providing her reason to her employer because it did not fit into the acceptable categories for absence. Id. at 158. In one instance, she told her employer that she needed a leave of absence for thirty days in order to tend to a sick relative; she testified at trial that her reported reason was false and her real reason for the absence was work environment anxiety. 3 T.T. at 3. In December 1988 Robinson received a call to work the day shift at the Mayport Yard. She did not feel safe or comfortable working that shift because most of the defendants work at that time. Her anxiety caused her to have difficulty sleeping and to miss two days of work. 3 T.T. at 39-40.

126. Robinson estimated her time lost (lost days) attributable to her inability to cope with the hostile work environment. She estimated six days lost in 1983 (at a rate of pay ranging from $9.50 to $10.00 per hour), twenty-eight days lost in 1984 (at $10.00 to $10.50 per hour), fifty days lost in 1985 (at $10.50 to $11.00 per hour), twenty-six days in 1986 (at $11.00 to $11.10 per hour), twenty-two days in 1987 (at the same rate), and thirty days in 1988 (at $10.50 to $11.00 per hour). Based on an eight hour day and lower rate of pay in each year, her estimated lost pay totals $13,640. She further estimated that she missed six holiday days between 1983 through 1988, which translates to a loss of triple the standard rate of pay for an eight hour day. 1 T.T. at 159-60. Her estimate for lost overtime earnings, which pays time and a half for Monday through Saturday and double time for Sunday, is fifteen days per year for the period. Id. at 159-60. She elected not to take certain welding certification tests because they would have made her more useful at the Mayport Yard, the work environment she sought most to avoid. Id. at 138-39. While Robinson's annual salary from JSI averaged approximately $11,000 to $12,000 over the last few years, 2 T.T. at 29-30, a male first-class welder with less seniority, Gene Joest, earned an average of approximately $19,000 to $20,000 from 1984 through 1987 because he worked overtime. 6 T.T. at 4-7. Although Robinson worked as a massage therapist when she did not work at JSI, she testified that the job always supplemented her JSI work and did not conflict with the opportunities she lost.

127. Robinson's estimates of days missed are an admitted approximation. She explained that she could not give the dates of these days missed and that the business records that she reviewed contained errors. 1 T.T. at 139-41; 3 T.T. at 4. Defendants objected at trial to Robinson's testimony estimating the number of days missed because she did not provide the precise dates when requested to do so in a supplemental interrogatory; she had provided only the number of days estimate upon which she relied at trial.[9] Robinson

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[9] Plaintiff's answer to the relevant question in defendants' first interrogatories, D. Exh. No. 27, at 9 (answer to question 7), specifically identifies 12 days in the time period March 3, 1988 through August 29, 1988. Using the lower hourly rate for this period, her stated loss is $1,056. This cannot form the basis of an award, however, for two reasons. First, it is incomplete and therefore would be no more than the equivalent of nominal damages. Second, plaintiff did not come forward with the additional quantum of proof necessary to adduce whether the equivalent of a constructive discharge existed for those dates or the broader time period.

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unsuccessfully sought business records that might have provided her with more detail from which to draw precise dates. Her lack of success in procuring this information is wholly attributable to her failure to seek to compel compliance with her discovery request within the time permitted by the Amended Docket Control Order, entered April 8, 1987. The Court affirmed the Magistrate's ruling that plaintiff failed to show excusable neglect for her dilatory efforts. *See* Order entered January 28, 1988, at 5-6. Plaintiff reasserted her desire to discover this evidence in her pretrial brief and the Court again refused to grant a unilateral exception to the deadlines in this case under the circumstances. The Court cannot now reward plaintiff's failure to conduct discovery within the deadlines by shifting the burden to the defendants to disprove Robinson's vague estimation of time lost. Robinson made and kept notes of various events throughout the course of her struggle to get JSI to recognize the sexually harassing nature of the pictures of nude and partially nude women. Her asserted inability to identify more precisely the dates at issue lacks credibility in this light. If her estimate of the number of days is based on something more than a guess, then she should be able to identify the dates with a greater degree of specificity. It is not unreasonable, under the circumstances of this case, to require more precision in her identification of time lost. Moreover, the standard for evaluating her claim for compensation for lost time requires that she show that conditions rose to or existed at a level equivalent to an intermittent constructive discharge. *See* 118 F.R.D. at 531. Defendants require a list of the specific dates on which plaintiff was absent in order to determine if the degree of harassment in the workplace on those dates rose to the level of this higher standard; plaintiff's failure to provide specific dates unfairly deprives defendants of the opportunity to argue that the work environment may be sufficiently hostile to create liability under Title VII without being sufficiently hostile to warrant plaintiff's absence from the job. The specific dates also would provide a basis for defendants to rebut Robinson's assertion that her massage therapist work did not conflict with her work at JSI; the lost overtime asserted may well have fallen on days when Robinson earned money as a massage therapist during the hours for which overtime was available.

128. The Court finds that Robinson's testimony on the financial loss alleged to flow from her missed opportunities and days off is insufficient to form a basis to calculate an entitlement to make-whole monetary relief. Likewise, the vagueness of the testimony relating to absences is an insufficient basis upon which to expunge warnings concerning absenteeism

CONCLUSIONS OF LAW

Title VII

1. Jurisdiction and venue are proper in this Court.

2. Robinson is an employee within the definition of 42 U.S.C. § 2000e(f). JSI is an employer within the definition of 42 U.S.C. § 2000e(b). Medwash, Brown, Stewart, Ahrwardt, Owens and Lovett are agents of JSI and are therefore employers within the meaning of 42 U.S.C. § 2000e(b).

3. Kiedrowski's status poses a difficult and complicated issue. He is an employer only if he is an agent of JSI, but "[n]owhere in Title VII is the term 'agent' defined." *Barger v. Kansas*, 630 F. Supp. 88, 89 (D. Kan. 1985). The most widely used definition construes the term "to be a supervisory or managerial employee to whom employment decisions have been delegated by the employer." *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982). Kiedrowski has held the positions of leaderman and quarterman, neither of which falls within the formal management structure at JSI. Moreover, he does not possess authority to place discipline reports in another employee's personnel file (although he may in some instances recommend that disciplinary action be taken), he does not play any role for the company in the grievance procedure, and he does not make personnel changes in his department. *Cf. Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1515 (11th Cir. 1989) (finding these factors persuasive in imposing direct liability under Title VII). The lesson of *Vance*, however, is "an agency standard which looks solely to the degree of authority the harasser wields over the plaintiff is not particularly useful in a hostile environment case such as this." *Id.* Instead, the direct authority question forms but one factor; it is necessary to "examine any evidence bearing on the overall structure of the workplace, including the relative positions of the parties involved." *Id.* Analyzed at this level, Kiedrowski's status becomes more problematic. Kiedrowski has a role in the work assignments, traditionally a significant factor leading to a finding of employer status. *See, e.g., Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *modified on other grounds*, 900 F.2d 27, 28 (4th Cir. 1990) (en banc); *Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986). Further, quartermen and leadermen sometimes exercise apparent authority by acting to resolve disputes between employees, including disputes that have arisen because of sexually harassing behavior. Employees recognize this difference in apparent authority by approaching them for assistance. These facts

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somewhat weigh in favor of assigning employer status to Kiedrowski. *Cf. Mason v. Twenty-Sixth Judicial Dist. of Kan.*, 670 F. Supp. 1528, 1532 (D. Kan. 1987) (employees could be held as Title VII employers where they were "given authority to rate the plaintiff in her performance and also to control work assignments and other conditions of employment"). The absence of a formal delegation in all instances and the exclusion of quartermen and leadermen from the formal supervisory structure, however, place the relative positions of the parties more closely to that of coworkers than that of employer and subordinate.[6] The limitations on the authority of quartermen and leadermen persuade the Court in the final balance to conclude that the role filled by quartermen and leadermen is not that of an employer and therefore the imposition of employer liability on Kiedrowski is inappropriate.

4. Five elements comprise a claim of sexual discrimination based on the existence of a hostile work environment: (1) plaintiff belongs to a protected category; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based upon sex; (4) the harassment complained of affected a term, condition or privilege of employment; and (5) respondeat superior, that is, defendants knew or should have known of the harassment and failed to take prompt, effective remedial action.[7] *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-69 (1986); *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982); *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 527-28 (M.D. Fla. 1988).

5. Robinson indisputably belongs to a protected category.

6. The threshold for determining that sexually harassing conduct is unwelcome is "that the employee did not solicit or incite it, and ... that the employee regarded the conduct as undesirable or offensive." *Henson*, 682 F.2d at 903 (citations omitted).

7. The relevant conduct in this case is the posting of pictures of nude and partially nude women in the workplace, the sexually demeaning remarks and jokes made by male workers, and harassment lacking a sexually explicit content such as the "Men Only" sign. The credible testimony of Robinson, corroborated by the observations of her supervisors and coworkers, attests to the offense she took at this behavior. *Cf. Vinson*, 477 U.S. at 68 ("the question whether particular conduct was indeed unwelcome presents difficult credibility determinations committed to the trier of fact"). Moreover, not a scintilla of evidence suggests that she solicited or incited the conduct. Robinson did not welcome the conduct of which she complains.

8. The third element imposes a requirement that Robinson "must show that but for the fact of her sex, she would not have been the object of harassment." *Henson*, 682 F.2d at 904. This causation requirement encompasses several claims. For example, harassing behavior lacking a sexually explicit content but directed at women and motivated by animus against women satisfies the requirement. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) ("The offensive conduct is not necessarily required to include sexual overtones in every instance."); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) ("Intimidation and hostility toward women because they are women can obviously result from conduct other than sexual advances."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985). Second, sexual behavior directed at women will raise the inference that the harassment is based on their sex. *E.g.*, *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904-05 (11th Cir. 1988); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987); see *Andrews*, 895 F.2d at 1485; *Lipsett*, 864 F.2d at 905; *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989). A third category of actionable conduct is behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex. *See Henson*, 682 F.2d at 904; *see also Andrews*, 895 F.2d at 1485-86; *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989), *rev'g* 47 Fair Empl. Prac. Cas. (BNA) 671 (W.D. La. 1987); *Lipsett*, 864 F.2d at 905; *Rabidue v. Osceola Ref. Corp.*, 805 F.2d 611, 627 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987). This third category describes behavior that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment. That Title VII outlaws such conduct is beyond peradventure. *Cf. Price*

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[6] These limitations do not diminish the significance of quartermen and leadermen in the control of sexually harassing behavior, nor do they diminish the reasonableness of the belief of female employees that reporting sexually harassing behavior to quartermen and leadermen constituted an appropriate course of action to secure remedy thereof.

[7] Although this fifth element bears the label "respondeat superior," it actually embraces a negligence standard for employer liability that essentially replaces the "fellow servant" rule. *See, e.g.*, *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 n.5 (10th Cir. 1990); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988).

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Waterhouse v. Hopkins, 490 U.S. 228, ___, 109 S. Ct. 1775, 1790-91 (1989) (plurality opinion); *id.* at ___, 109 S. Ct. at 1797-99 (O'Connor, J., concurring in judgment) (use of gender stereotypes to evaluate female employees violates Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII was passed to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of [an] impermissible classification").

9. The harassment of which Robinson complains was based upon her sex. The Findings of Fact reflect examples of the three aforementioned types of behavior. She suffered nonsexual harassing behavior from coworkers such as George Leach, who verbally abused or shunned her because she is a female. The "Men Only" sign also illustrates this type of harassment. She suffered incidents of directed sexual behavior both before and after she lodged her complaints about the pictures of nude and partially nude women. The pictures themselves fall into the third category, behavior that did not originate with the intent of offending women in the workplace (because no women worked in the jobs when the behavior began) but clearly has a disproportionately demeaning impact on the women now working at JSI. The expert testimony of Dr. Fiske provides solid evidence that the presence of the pictures, even if not directed at offending a particular female employee, sexualizes the work environment to the detriment of all female employees.

10. The fourth element tests the impact of the harassing behavior on the employee and the work environment, separating the "mere utterance of . . . [a discriminatory] epithet which engenders offensive feelings in an employee," *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), and "the petty slights suffered by the hypersensitive," *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984), from actionable conduct under Title VII. To affect a "term, condition, or privilege" of employment within the meaning of Title VII, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Vinson*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904). "The test may be satisfied by a showing that the sexual harassment was sufficiently severe or persistent 'to affect seriously [the victim's] psychological well being.'" *Sparks*, 830 F.2d at 1561 (quoting *Henson*, 682 F.2d at 904). This "is a question to be determined with regard to the totality of the circumstances." *Henson*, 682 F.2d at 904. In the context of a racial harassment case, which is governed by the same standards under Title VII as a sexual harassment case, see *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 2374 (1989); *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 485 (6th Cir. 1989), the Eleventh Circuit elaborated on the evaluation of the totality of the circumstances:

> The prima facie showing in a hostile work environment case is likely to consist of evidence of many or very few acts or statements by the defendant which, taken together, constitute harassment. It is important to recognize that in assessing the credibility and weight of the evidence presented, the [trier of fact] does not necessarily examine each alleged incident of harassment in the vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents.
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> . . . .
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> A hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits. . . . [T]he totality of the circumstances necessarily includes the severity, as well as the number, of incidents of harassment.

Vance, 863 F.2d at 1510-11 (footnote omitted).

11. Element four must be tested both subjectively and objectively. Regarding the former, the question is whether Robinson has shown she is an "affected individual," that is, she is at least as affected as the reasonable person under like circumstances. See *Robinson*, 118 F.R.D. at 530. The evidence reflects the great upset that Robinson felt when confronted with individual episodes of harassment and the workplace as a whole. Further, the impact on her work performance is plain. For essentially the same reasons that she successfully proved her case on the second element of this cause of action, Robinson likewise carries her burden as to the subjective part of the fourth element. (Defendants, having urged throughout these proceedings that Robinson is hypersensitive, appear to concede the point.) The contested issue in this case is the objective evaluation of the work environment at JSI.

12. The objective standard asks whether a reasonable person of Robinson's sex, that is, a reasonable woman, would perceive that an abusive working environment has been created. See *Vinson*, 477 U.S. at 67; *Andrews*, 895 F.2d at 1482; *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419-20 (7th Cir. 1989). The severity and pervasiveness aspects form a structure to test this hypothesis. As the prior quotations illustrate, the contours of what comprises "severe" and "pervasive" are not defined with precision. An interaction between the two is plain; greater severity in the impact of harassing behavior requires a lesser degree of pervasiveness in order to reach a level at which Title VII liability attaches. *E.g.*, *Carrero v. New*

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York Hous. Auth., 890 F.2d 569, 577 (2d Cir. 1989). Moreover, the analysis cannot carve the work environment into a series of discrete incidents and measure the harm adhering in each episode. Rather, a holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes. "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents but on the overall scenario." Andrews, 895 F.2d at 1484. It follows naturally from this proposition that the environment viewed as a whole may satisfy the legal definition of an abusive working environment although no single episode crosses the Title VII threshold.

13. The objective evaluation must account for the salient conditions of the work environment, such as the rarity of women in the relevant work areas. This important qualification explains why the Court places little value on the expert testimony of Drs. Mosher and Scott regarding the level of offensiveness to women of pornographic materials as measured in the abstract. Correspondingly, the need to identify the context in which harassing conduct arises weighs heavily in the Court's acceptance of the expert opinions of Dr. Fiske and Ms. Wagner.

14. A reasonable woman would find that the working environment at JSI was abusive. This conclusion reaches the totality of the circumstances, including the sexual remarks, the sexual jokes, the sexually-oriented pictures of women, and the nonsexual rejection of women by coworkers. The testimony by Dr. Fiske and Ms. Wagner provides a reliable basis upon which to conclude that the cumulative, corrosive effect of this work environment over time affects the psychological well-being of a reasonable woman placed in these conditions. This corollary conclusion holds true whether the concept of psychological well-being is measured by the impact of the work environment on a reasonable woman's work performance or more broadly by the impact of the stress inflicted on her by the continuing presence of the harassing behavior. The fact that some female employees did not complain of the work environment or find some behaviors objectionable does not affect the conclusion concerning the objective offensiveness of the work environment as a whole. *See Priest v. Rotary*, 634 F. Supp. 571, 582 (N.D. Cal. 1986); *Morgan v. Hertz Corp.*, 542 F. Supp. 123, 128 (W.D. Tenn. 1981), *aff'd*, 725 F.2d 1070 (6th Cir. 1984).

15. The Court recognizes the existence of authority supporting defendants' contention that sexually-oriented pictures and sexual remarks standing alone cannot form the basis for Title VII liability. The Court concludes that the reasoning of these cases is not consistent with Eleventh Circuit precedent and is otherwise unsound.

(a) Defendants' authority, which hails from other jurisdictions, proceeds from premises that are inconsistent with authority that is binding on the Court. For example, the Sixth Circuit in *Rabidue* quoted with approval the conclusion of the district court that

> it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to -- or can -- change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.

805 F.2d at 620-21 (quoting in full 584 F. Supp. 419, 430).[*] That conclusion buttressed the appellate court's belief that "a proper assessment or evaluation of an employment environment" in a sexual harassment suit includes "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment." *Id.* at 620. The *Rabidue* court further expounded on the social context argument:

> The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.

Id. at 622. These propositions, however, cannot be squared with the Eleventh Circuit's holding in *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 & n.2 (11th Cir. 1982), that the social milieu of the area and the workplace does not diminish the harassing impact of racial slurs. (As previously noted, the analysis is not different for racial and sexual harassment claims.) The point is made more directly for sexual harassment claims in *Sparks*, wherein the appellate court explained that often "the whole point of the sexual harassment claim" is that behavior that "may be permissible in some settings . . . can be abusive in the workplace . . . ." 830 F.2d at 1561.

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[*] The Sixth Circuit subsequently explained that the passage should be read with "emphasis on the word 'magical,' not the word 'transformation.' Title VII was not intended to eliminate all private prejudice and biases. The law, however, did alter the dynamics of the workplace because it operates to prevent bigots from harassing their co-workers." *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), cert. denied, 109 S. Ct. 3166 (1989).

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n.13; see also *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 n.11 (5th Cir. 1989) ("heavy pollution defense" inconsistent with *Vinson* and *Henson*). A district court within the Eleventh Circuit recently concluded that a sexually hostile work environment was created in a police department when male officers subjected a female patrol officer to verbal abuse, "a plethora of sexually offensive posters, pictures, graffiti, and pinups placed on the walls throughout the Police Department," and "innumerable childish, yet offensive sexual and obscene innuendoes and incidents aimed at her on the basis of sex." *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 (S.D. Fla. 1989).

(b) The "social context" argument also lacks a sound analytical basis. Professor Kathryn Abrams has written an insightful critique of this argument:

> The *Rabidue* court's proposed standard is wholly inappropriate for several reasons. Not only did the court overestimate the public consensus on the question of pornography, but the fact that many forms of objectionable speech and conduct may be protected against interference by public authorities in the world at large does not mean that pornography should be accepted as appropriate in the workplace. Pornography in the workplace may be far more threatening to women workers than it is to the world at large. Outside the workplace, pornography can be protested or substantially avoided -- options that may not be available to women disinclined to challenge their employers or obliged to enter certain offices. Moreover, while publicly disseminated pornography may influence all viewers, it remains the expression of the editors of *Penthouse* or *Hustler* or the directors of *Deep Throat*. On the wall of an office, it becomes the expression of a coworker or supervisor as well.
>
> In this context the effect of pornography on workplace equality is obvious. Pornography on an employer's wall or desk communicates a message about the way he views women, a view strikingly at odds with the way women wish to be viewed in the workplace. Depending upon the material in question, it may communicate that women should be the objects of sexual aggression, that they are submissive slaves to male desires, or that their most salient and desirable attributes are sexual. Any of these images may communicate to male coworkers that it is acceptable to view women in a predominately sexual way. All of the views to some extent detract from the image most women in the workplace would like to project: that of the professional, credible coworker.

Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1212 n.118 (1989) (citation omitted); accord *Andrews*, 895 F.2d at 1485-86; *Lipsett*, 864 F.2d at 905 (adopting analysis of dissent in *Rabidue*); *Bennett*, 845 F.2d at 106; *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 573 & n.2 (W.D.N.Y. 1987); Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177, 1201-10 (1990); Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L. Rev. 1, 11-16 (1990). Professor Catharine MacKinnon makes the point in a pithy statement: "If the pervasiveness of an abuse makes it nonactionable, no inequality sufficiently institutionalized to merit a law against it would be actionable." C. MacKinnon, Feminism Unmodified 115 (1987).

(c) The "social context" argument cannot be squared with Title VII's promise to open the workplace to women. When the pre-existing state of the work environment receives weight in evaluating its hostility to women, only those women who are willing to and can accept the level of abuse inherent in a given workplace -- a place that may have historically been all male or historically excluded women intentionally -- will apply to and continue to work there. It is absurd to believe that Title VII opened the doors of such places in form and closed them in substance. A pre-existing atmosphere that deters women from entering or continuing in a profession or job is no less destructive to and offensive to workplace equality than a sign declaring "Men Only." As the Fifth Circuit recently observed, "Work environments 'heavily charged' or 'heavily polluted' with racial or sexual abuse are at the core of the hostile environment theory." *Wyerick*, 887 F.2d at 1275. To implement fully the promise of Title VII, "the standards for assessing women's psychological harm due to harassment must begin to reflect women's sensitivity to behavior once condoned as acceptable." Note, *The Aftermath of Meritor: A Search for Standards in the Law of Sexual Harassment*, 98 Yale L.J. 1717, 1737-38 (1989).

(d) The *Rabidue* analysis violates the most basic tenet of the hostile work environment cause of action, the necessity of examining the totality of the circumstances. Excluding some forms of offensive conduct as a matter of law is not consistent with the factually oriented approach dictated by *Vinson*, *Henson*, and their progeny. The expert testimony in this case places the many instances of offensive behavior into a context that permits evaluation of the environment as a whole. The Court cannot ignore the expert testimony, or the Court's own perception of the work environment evaluated as a whole; it would have to do so in order to adopt the *Rabidue* conclusion that a sexually charged environment has only a "*de minimis* effect" on the psychological well-being of a reasonable woman who works in the skilled crafts at JSI.

16. Having determined that the first four elements of a sexual harassment claim have been satisfied, the Court faces the task of assessing the liability of the employers in this case. The corporate employer, JSI, is subject only to vicarious liability, an issue more fully developed *infra*. The individual employers, however, pose a distinct liability issue.

17. The principles of employer liability for individual corporate officers are broad. It has been described as "inconceivable that Congress intended to exclude from liability the

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only persons who have engaged in the employment practices which are the subject of the action." *Dague v. Riverdale Athletic Ass'n*, 99 F.R.D. 325, 327 (N.D. Ga. 1983). Instead, a liberal interpretation of Title VII works to hold responsible "those who control the aspects of employment accorded protection" by that law. *Spirt v. Teachers Ins. & Annuity Ass'n*, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in relevant part*, 691 F.2d 1054 (2d Cir. 1982), *vacated*, 463 U.S. 1223 (1983), *reinstated as modified*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984).

> It may seem odd that an individual occupying a supervisory position could be held liable for the acts of his underlings when the employer of both can also be held liable, particularly where the supervisor had no personal involvement in the discriminatory acts of those working for him. However, placing an affirmative duty to prevent discriminatory acts on those who are charged with employment decisions appears to be consistent with the aims of Title VII.

McAdoo v. Toll, 591 F. Supp. 1399, 1406 (D. Md. 1984). Because these principles are so broad, however, they should be applied with an eye toward finding liability only against individuals who exercise effective control in the workplace -- those persons who make or contribute meaningfully to employment decisions. *See, e.g., Kolb v. Ohio*, 721 F. Supp. 885, 891 (N.D. Ohio 1989); *McAdoo*, 591 F. Supp. at 1406. Thus, lower level supervisory employees who qualify as employers should be exonerated from liability when they do no more than follow the policies established by their superiors. Individual liability attaches, *if at all*, to the generals, not their soldiers.

18. McIlwain is not liable for the hostile work environment to which Robinson was subjected. He did not personally participate in any sexually harassing behavior that affected Robinson and he was not personally presented with her complaints of sexual harassment. Indeed, his status as an employer derives from his status as an agent of JSI. The responsibility for handling sexual harassment complaints was delegated to supervisory personnel below McIlwain. While Robinson suggests that the delegation creates an agency relationship between McIlwain and the supervisory personnel responsible for remedying sexual harassment, her argument does not account for the source of McIlwain's authority to delegate. The delegation is done on behalf of the corporation, within McIlwain's agency relationship with JSI, and it therefore creates an agent-principal relationship between the delegatees and JSI, not the delegatees and McIlwain. *See Brown*, 684 F. Supp. at 1085-86; see also Restatement (Second) of Agency § 5 comment a (1958); *id.* § 222. Accordingly, JSI, not McIlwain, incurs liability when the actions (or inactions) of the delegatees create the circumstances for the application of *respondeat superior*.

19. Brown is liable for the hostile work environment to which Robinson was subjected. His responsibility extended to the creation and implementation of JSI's sexual harassment policies. Their failure is his failure. Additionally, he personally intervened in Robinson's complaint and directed that no remedial action be taken.

20. Stewart is liable for the hostile work environment to which Robinson was subjected. He held responsibility for the day-to-day administration of the sexual harassment complaint machinery. Its failure is his failure. Additionally, he personally intervened in Robinson's complaint and directed that no remedial action be taken.

21. Ahwardt is not liable for the hostile work environment to which Robinson was subjected. He stood in a middle management position and did no more or less than implement the order of his superiors, albeit with little finesse or compassion.

22. Owens is not liable for the hostile work environment to which Robinson was subjected. He also stood too far down on the ladder of authority to accrue individual liability for the state of the workplace.

23. Lovett is not liable for the hostile work environment to which Robinson was subjected. Not only did he stand too far down on the ladder of authority, he did not exercise control directly over Robinson.

24. Defendants argue that they cannot be held liable unless they personally participated in sexually offensive conduct, citing *Brown v. City of Miami Beach*, 684 F. Supp. 1081, 1085-86 (S.D. Fla. 1988), *judgment rendered sub nom. Sanchez v. City of Miami Beach*, 720 F. Supp. 974 (S.D. Fla. 1989), and *Hendrix v. Fleming Cos.*, 650 F. Supp. 301, 302-03 (W.D. Okla. 1986). The Court disagrees with the limiting force of defendants' proposition. Active participation in sexually harassing behavior is a sufficient but not a necessary condition to the imposition of Title VII liability.[*] An individual employer who ratifies the sexually harassing

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[*] Plaintiff seeks to hold Ahwardt and Lovett directly liable for their admissions that they have posted sexually-oriented pictures in their own work areas. No evidence adduced at trial demonstrated that these pictures formed part of the work environment to which Robinson was subjected. Indeed, it appears that their personal pin-ups appeared on and were removed from the walls before Robinson began work at JSI. Absent such proof, Ahwardt's and Lovett's pictures cannot form the basis for direct liability to Robinson. This is not to say that those pictures are not important as evidence of the scope of the hostile work environment and of management's attitude toward the conditions that created the environment, for they are. Rather, the principle upheld is that an individual as an employer is held liable only for those actions taken by the individual that actually have an impact on the complaining employee.

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conduct of another is surely as culpable as if the employer actively participated. *See McAdoo*, 581 F. Supp. at 1406. One method of ratification is an individual employer's failure or refusal to act to remedy a valid complaint of sexual harassment presented to that individual for which the individual has a duty to respond. *See Morris v. American Nat'l Can Corp.*, 730 F. Supp. 1489, 1496-97 (E.D. Mo. 1989); *Maturo v. National Graphics, Inc.*, 722 F. Supp. 916, 923-24 (D. Conn. 1989).

25. *JSI* is liable for the hostile work environment to which Robinson was subjected. Corporate defendant liability may be proved under either of two theories. Direct liability is incurred when an agent of the corporate employer is responsible for the behavior that comprises the hostile work environment and the agent's actions were taken within the scope of the agency. *See Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 n.1 (11th Cir. 1989); *Vance*, 863 F.2d at 1512. Indirect liability attaches where the hostile environment is created by one who is not the plaintiff's employer, such as a coworker, or by an agent of the employer who is acting outside the scope of the agency, and the plaintiff can establish that the employer knew or should have known of the harassment and failed to take prompt, effective remedial action. *See Steele*, 867 F.2d at 1316; *Vance*, 863 F.2d at 1512; *Henson*, 682 F.2d at 910. The Court concludes that Robinson has demonstrated JSI's liability under both theories.

26. Direct liability for a corporate defendant in a hostile work environment case is unusual. In *Steele*, the Eleventh Circuit described the concept as "illogical" because "[t]he supervisor does not act as the company; the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.'" 867 F.2d at 1316. This proposition is true for the facts of that case, where a male supervisor made sexually offensive comments to a female employee and company policy clearly disapproved of such conduct. The agency principles involved in *Steele* apply more clearly because of the nature of the harassment. Here it must be recognized that "the legal concept [of the scope of employment] was developed for factual settings bounded by a specific authorized task, a single unauthorized act, and one-time injury. Consequently, it is difficult to draw useful analogies to the continuing injuries and complex management practices involved in sexual harassment." Note, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 Colum. L. Rev. 1258, 1273 (1987). It is therefore necessary to examine closely the fashion in which the agents exercised authority in this case.

(a) The policymaking agents of the corporate defendant condoned the distribution of the vendors' advertising calendars that formed part of the basis for Robinson's 1985 complaint. The work rules at JSI did not permit the posting of many kinds of materials, required permission for the posting of other kinds of materials, but did not restrict the posting of pictures of nude or partially nude women. Direct liability is apparent when an employer's policy subjects female employees to sexual harassment on the job. *See Priest*, 634 F. Supp. at 581; *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609-10 (S.D.N.Y. 1981); *Marentette v. Michigan Host, Inc.*, 24 Fair Empl. Prac. Cas. (BNA) 1665, 1680 (E.D. Mich. 1980).

(b) Brown and Stewart occupied the key positions at JSI for controlling the quality of the work environment. When faced with Robinson's complaint over sexually-oriented pictures, they did not merely fail to act to remedy the hostile environment, they affirmatively endorsed and ratified a portion of it. Moreover, the 1987 policy change presented an opportunity to begin reform of the work environment, and the materials accompanying the model policy suggested a course consistent with remedying plaintiff's complaint, but JSI declined to take these suggested steps.

(c) The aforementioned actions came within the scope of the agency relationship between JSI and its supervisors who acted as policymaking agents. *Cf. Sparks*, 830 F.2d at 1558-60 & n.6 (setting forth relevant common law agency principles). The supervisors acted as the company. *See Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir. 1986) ("to say that the 'corporation' has committed some wrong . . . simply means that someone at the decision-making level in the corporate hierarchy has committed the wrong"). Liability therefore flows directly to the corporate employer, JSI. *See* Restatement (Second) of Agency § 218 (common law agency principles of ratification); *see also Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F.2d 963, 966 (7th Cir. 1986) ("Principals are strictly liable for their agents' acts . . . if the principals authorize or ratify the acts or even just create an appearance that the acts are authorized.").

27. Liability also flows to *JSI* indirectly. *JSI* may be charged with actual or constructive knowledge of the harassing conduct. "The employee can show that the employer had knowledge of the harassment by proving that she complained to higher management of the problem or by demonstrating that the harassment was so pervasive that an inference of constructive knowledge arises." *Huddleston*, 845 F.2d at 904. Both types of knowledge exist in this case.

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28. Actual complaints of sexual harassment are documented for several instances in this regard; two points merit discussion.

(a) One, JSI must assume knowledge for complaints to quarterman and leaderman. As noted supra, quarterman and leaderman are not agents of JSI to the extent that they may be held as employers under Title VII. The facts show, however, that JSI relied upon these quasi-supervisory bargaining unit employees to monitor work performance, particularly on remote job sites within the compounds. Employees perceived that quarterman and leaderman were appropriate persons to whom to complain about work conditions. *Cf.* *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 380 (W.D.N.C. 1988) (reporting of incidents of sexual harassment to dispatchers appropriate and adequate notice where dispatchers were in most frequent contact with employee truck drivers and were responsible for passing information up corporate hierarchy to supervisory personnel). Quarterman and leaderman apparently exercised discretion whether to act on these complaints or to refer the complaints to management supervisors. *Cf. id.* JSI structured its work environment in this fashion and condoned the apparent authority sometimes exercised by quarterman and leaderman. Point in fact, the sexual harassment policies were little known and understood, so JSI's formal assignment of complaints to other management personnel was wholly ineffectual. *See Vinson*, 477 U.S. at 72 (mere existence of complaint procedure and policy against discrimination insufficient to insulate employer from liability); *cf. EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989); *Lipsett*, 864 F.2d at 907 n.27; *Sanchez*, 720 F. Supp. at 979. Accordingly, the company must accept responsibility for the reporting of sexual harassment complaints to the individuals occupying the positions of quarterman and leaderman. Moreover, JSI must bear the responsibility of deterred reports of sexual harassment caused by the treatment of female employees by the quarterman and leaderman.

(b) Two, JSI cannot stand on an "ostrich defense" that it lacked knowledge of many of the complaints, because its handling of sexual harassment complaints deterred reporting and it did not conduct adequate investigation of the complaints it did receive. JSI received reports at the supervisory level and at the line level (quarterman and leaderman) concerning incidents of sexual harassment. Additionally, many supervisory personnel admitted that they knew of the sexually-oriented pictures throughout the workplace. Defendants concede several such reports in a series of tables attached to their post-trial brief; the testimony as recorded in the Findings of Fact documents many more reports. These reports should have alerted JSI management to the need to conduct a more thorough investigation of conditions in the shipyards. A duty to conduct further investigation arises when a report or reports of sexual harassment to management suggests that the workplace may be charged in a sexually hostile manner. *See Rasinger*, 893 F.2d at 461-62; *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987); *Paroline*, 879 F.2d at 107; *Rauh v. Coyne*, 744 F. Supp. 1181, 1186 (D.D.C. 1990) (investigation of complaints by other female employees may have uncovered problem in workplace prior to harassment of plaintiffs); *Watts v. New York City Police Dep't*, 724 F. Supp. 99, 107-08 & n.7 (S.D.N.Y. 1989) (reports from other female employees may trigger duty to investigate workplace as a whole). JSI instead ignored the warning signs of a hostile work environment. The evidence reveals a supervisory attitude that sexual harassment is an incident-by-incident matter; records were not maintained that would have permitted an analysis of sexual harassment complaints to determine the level of sexual hostility in the workplace. Under these circumstances, the Court concludes that JSI received adequate actual knowledge of the state of the work environment but, like an ostrich, the company elected to bury its head in the sand rather than learn more about the conditions to which female employees, Robinson in particular, were subjected.[*]

29. The Court additionally imposes constructive knowledge on JSI for the sexually hostile state of its work environment. Constructive knowledge is measured by a practical threshold. An employer escapes liability for isolated and infrequent slurs and misogynist behaviors because even a reasonably prudent employer cannot exercise sufficient control over the workplace to put an end to such conduct; conversely, an employer incurs liability when harassing behavior happens frequently enough that the employer can take steps to halt it. *See Hunter*, 797 F.2d at 1421-22. The sexually harassing behaviors described in the Findings of

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[*] The phrase used here is intended to call attention to the analogy between these circumstances and the concept of deliberate ignorance, covered by the so-called ostrich instruction, in the criminal law. *See, e.g.*, *United States v. Restrepo-Granda*, 575 F.2d 524, 528 (5th Cir.) ("deliberate ignorance is the equivalent of knowledge"), *cert. denied*, 439 U.S. 935 (1978). As one court stated,

> [w]hen someone knows enough to put him on inquiry, he knows much. If a person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge.

United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.), *cert. denied*, 476 U.S. 1186 (1986).

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Yard are too pervasive to have escaped the notice of a reasonably alert management. *E.g.*, *Andrews*, 895 F.2d at 1479, 1486 ("middle management" must have known of comments and pictures); *Waltman*, 875 F.2d at 478-79; *Lipsett*, 864 F.2d at 906 & n.25 (knowledge unavoidable when management entered areas where pictures were posted); *Bennett*, 845 F.2d at 106 (management official saw offending cartoons but did not remove them until plaintiff complained on next day); *Hall*, 842 F.2d at 1016; *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983). Moreover, the extent to which coworkers and supervisory personnel actually knew of the existence of sexually harassing behavior is a good barometer of the company's constructive knowledge. *Cf. Vaughn v. AG Processing, Inc.*, 459 N.W.2d 627, 635 (Iowa 1990). The testimony before this Court establishes that Robinson's plight was widely known. To the extent that JSI contends that the physical size of its work environment diminished its ability to monitor incidents of sexual harassment, the company must realize that its expansive size may increase its burden in providing a workplace free of discrimination, but that expanse does not decrease its responsibility in this task. *See Llewellyn*, 693 F. Supp. at 380.

30. Given that JSI should have responded and did respond to some aspects of the sexually hostile work environment, the effectiveness of its responses must be evaluated. Two methods of measuring effectiveness have received endorsement. One, the employer's total response is evaluated on the basis of the circumstances as then existed. *See, e.g.*, *Brooms*, 881 F.2d at 421. The employer's response is ineffective if "it delay[ed] unduly . . . [and] the action it [did] take, however promptly, [was] not reasonably likely to prevent the misconduct from recurring." *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990). Two, an employer can defend successfully by showing that the conduct brought to the company's attention was not repeated after the employer took action. *See, e.g.*, *Steele*, 867 F.2d at 1316 (special importance attached to fact that harassment ended after employer took remedial steps). In this regard, the employer must show the effectiveness of the actions, not merely that actions were taken. *See, e.g.*, *Sanchez*, 720 F. Supp. at 981-82 (remedial action of new sexual harassment policy and procedures constituted change in form, not in substance).

31. JSI did not respond to complaints of sexual harassment with prompt, effective remedial measures. In some instances in which a complaint was made, offending graffiti and pictures were removed promptly; in many other instances, no action was taken or the action was taken after considerable delay. It is noteworthy that the company did not either seek to identify the perpetrators of most harassing incidents (such as the "Men Only" sign and the pictures and graffiti that were removed), *cf. Tunis v. Corning Glass Works*, 698 F. Supp. 452, 460 (S.D.N.Y. 1988) (employer could be held liable for failing "to attempt to identify the offending . . . employees, much less to discipline them"), *judgment entered for defendant*, 747 F. Supp. 951 (S.D.N.Y. 1990), or take steps to communicate with other male employees concerning the nature of the offending behavior and the need to show respect to female employees, *cf. Daniels v. Essex Group, Inc.*, 740 F. Supp. 553, 559-60 (N.D. Ind. 1990) (company did not take steps to warn against repetition of racially harassing behavior). Those remedial actions that were taken, such as the removal of pictures or painting over the "Men Only" sign, lacked effectiveness, as the pictures often were replaced and the sign remained visible through the paint. The evidence shows that complainants were treated as not credible if their complaint lacked independent corroboration, that little investigation was conducted of complaints, and that discipline, on the rare occasions that it was meted out, did not reflect the seriousness of the offense. These weaknesses create liability on the corporation's part. *See, e.g.*, *Paroline*, 879 F.2d at 106-07 (failure to investigate and failure to impose commensurate discipline); *Hays v. City of Lincoln*, 871 F.2d 750, 756 (8th Cir. 1989) (failure to investigate and failure to discipline); *Morris*, 730 F. Supp. at 1496-97 (failure to interview complainant and reliance on coworkers to police themselves); *Mauro*, 722 F. Supp. at 923 (failure to intervene after initial complaints); *Anderson v. Hewlett-Packard Corp.*, 694 F. Supp. 1294, 1304 (N.D. Ohio 1988) (demanded additional corroboration from complainants, exhibiting stereotypical thinking about frivolity of complaints by women); *Llewellyn*, 693 F. Supp. at 377-81.

32. Not only were the behaviors repeated throughout the workplace and over time, but examples show that the same individuals would repeat sexually harassing misconduct following intervention from management. Moreover, JSI cannot escape the burden of responsibility for many unreported instances of sexual harassment. Although JSI did not receive the opportunity to respond to these instances due to the lack of a formal complaint, the fact that a complaint was not made resulted from the failure to maintain an effective sexual harassment complaint procedure and other circumstances in the work environment that deterred the reporting of episodes of sexual harassment.

33. The response to Robinson's complaint demonstrated a lack of appreciation for the gravity of the conduct of which she complained. In doing so, management condoned and

encouraged further harassment. The small steps taken in response, such as the moving of an offensive calendar and the removal of some pictures, are outweighed by the continuing abuse that went unremedied.

Executive Order No. 11246

34. Plaintiff asserts that liability may be imposed for violation of the anti-discrimination provisions of Executive Order No. 11246 and as a breach of contract enforced by plaintiff as a third-party beneficiary to the United States Navy contracts entered into by JSI. The Court rejects these theories of liability. In *Banks v. Jacksonville Shipyards, Inc.*, Case No. 88-128-Civ-J-16 (M.D. Fla. July 7, 1989), Judge Moore of this Court dismissed claims asserting these theories of liability. His decision is highly persuasive, for it rests on a sound legal foundation. In *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 (5th Cir.), cert. denied, 389 U.S. 977 (1967), the appellate court found no private cause of action under the predecessor order to Executive Order No. 11246. *Farkas* is binding precedent, and its continuing validity received a boost from dictum in *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1515 (11th Cir. 1985), that states that no private cause of action is available under Executive Order No. 11246. These cases seem to settle the issue, but if the precedent is not in fact dispositive, the Court adopts the analysis finding no private cause of action which appears in *Utley v. Varian Assocs.*, 811 F.2d 1279, 1284-86 (9th Cir.), cert. denied, 484 U.S. 824 (1987). *Accord Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750 (D.C. Cir. 1990). The third-party beneficiary theory is merely derivative of the private cause of action theory and the former cannot be entertained given the disposition of the latter.

Remedy

35. Plaintiff is not entitled to monetary relief as a make-whole remedy. As a general rule, a plaintiff is entitled to backpay when economic injury is suffered as a result of discrimination. *See Nord v. United States Steel Corp.*, 758 F.2d 1462, 1472 (11th Cir. 1985) ("Under the 'make whole' rationale . . . , victorious Title VII plaintiffs are presumptively entitled to back pay"). Also, a plaintiff's presentation of evidence showing economic injury stemming from discrimination will create an entitlement to backpay unless defendants effectively rebut, by a preponderance of evidence, the plaintiff's assertion of loss. *Id.* at 1470-71. However, the linchpin of these principles is the plaintiff's initial burden to demonstrate economic loss. *See EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990) (court should not award backpay unless wages are properly owed to employee); *Jinks v. Mays*, 464 F.2d 1223, 1228 (5th Cir. 1972) (proving wages are properly owed "requires positive proof that plaintiff was ordinarily entitled to the wages in question and, being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed"); *Ross v. Twenty-Four Collection, Inc.*, 681 F. Supp. 1547, 1555 (S.D. Fla. 1988) (employer's burden to rebut claim for backpay begins when plaintiff satisfies "the burden of proving the amount of damage resulting from the employer's discriminatory acts"), *aff'd*, 875 F.2d 873 (11th Cir. 1989) (Table). The burden includes the presentation of the evidence of the loss in a form that is not merely speculative. *See, e.g., Huddleston*, 845 F.2d at 905 (evidence of lost commissions too vague to provide basis for award of backpay); *Walker*, 684 F.2d at 1362-63 (backpay properly denied where continued employment was speculative and plaintiff provided no evidence concerning likelihood that he would be retained); *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 219 & n.19 (E.D. Va. 1988) (monetary relief unavailable for speculative losses of overtime and promotions, particularly given absence of reasonable basis to quantify promotional opportunities), *aff'd*, 894 F.2d 651 (4th Cir. 1990); *see also Darlton v. Boilermakers Local 29*, 673 F. Supp. 37, 41 (D. Mass. 1987) (burden of proving backpay entitlement satisfied by reasonable basis of computation). Robinson has not satisfied this part of her burden, as explained in FOF ¶ 127, and therefore the monetary relief will not be granted.

36. Nominal damages are available and appropriate where actual loss is not proven or provable. *Huddleston*, 845 F.2d at 905; *Hanson*, 682 F.2d at 905; C. McCormick, Handbook on the Law of Damages § 20 (1935). The Court thus will award nominal damages in the amount of $1.00 against JSI. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (one dollar is appropriate amount for nominal damages). Because nominal damages are awarded as a surrogate for a backpay award, the circumstances of an award should be identical. Binding precedent holds that public officials cannot be held personally liable for backpay under Title VII, *see Clanton v. Orleans Parish School Bd.*, 649 F.2d 1084, 1099 & n.19 (5th Cir. Unit A July 1981); persuasive authority extends this principle to individual employer defendants in private corporations,[11] *see Seib v. Elko Motor Inn, Inc.*, 648 F. Supp. 272, 274 (D. Nev. 1986); *Pree v.*

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[11] *Seib* and *Pree* reach this conclusion deductively from *Clanton* and other cases. The same result may be produced from a different approach. Backpay is part of the equitable remedy of reinstatement. *See, e.g., Harkless v. Sweeny Indep. School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971). It makes little sense to speak of reinstatement by the individual defendants; the corporate defendant bears the burden of that

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Stone & Webster Eng'g Corp., 607 F. Supp. 945, 950 (D. Nev. 1985). On this basis the nominal damages should be awarded against JSI only. Alternatively, backpay liability also may be limited for equitable reasons tailored to the circumstances of the individual's involvement, see, e.g., *Adman v. Stevens Fashion Fabrics*, 441 F. Supp. 1316, 1321 (N.D. Cal. 1977). The circumstances in this case do not show Brown or Stewart to be motivated by any ill will or bad faith; they appear to have acted on their belief concerning the best interests of JSI. The Court thus also finds equitable grounds to limit the assessment of nominal damages to JSI alone.

37. Plaintiff is entitled to injunctive relief. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1561 (11th Cir.), cert. denied, 479 U.S. 883 (1986). It must take the form of negative and affirmative relief. Simply enjoining JSI from engaging in or permitting further sexually harassing behavior is insufficient to repair and rehabilitate the sexually hostile working environment. The history of management's condonation and approval of sexually harassing conditions, together with the past failures to redress effectively those instances of sexual harassment of which management disapproved, argue forcefully for affirmative relief that provides guidance for all employees regarding acceptable and offensive conduct, provides confidence to female employees that their valid complaints of sexual harassment will be remedied, and provides male employees who transgress the boundaries of sexual harassment with notice that their conduct will be penalized commensurate with the seriousness of the offense.

38. This Court must "render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Ms. Wagner endorsed plaintiff's proposed sexual harassment policy and procedures as an effective remedy for the work environment at JSI. The Court agrees with her assessment. The Court notes the use of education, training, and the development of effective complaint procedures as an appropriate remedy in prior hostile work environment sexual harassment cases. See, e.g., *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981); *Morris*, 730 F. Supp. at 1489; *Sanchez*, 720 F. Supp. at 982; *but see Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1216 (D.D.C. 1990) (declining to monitor potential for sexual stereotyping in future promotions because remedy is too intrusive, unnecessary to provide notice of potential liability if defendant failed to monitor itself, and case was atypical), *on remand from* 490 U.S. 228 (1989), *aff'd*, ___ F.2d ___, 1990 WL 191405 (D.C. Cir. Dec. 4, 1990). The Court adopts the policy and procedures proposed by plaintiff, with the exceptions stated herein.

39. Injunctive relief is limited to the corporate defendant, JSI, because there exists no reason to believe that Brown and Stewart will act contrary to a court order covering their employer and their liability is incidental to their actions taken within the scope of their employment. They are in privity with JSI and thereby are effectively bound by a decree directed to the corporation alone. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945); *Professional Ass'n of College Educators v. El Paso County Community College Dist.*, 730 F.2d 258, 274 (5th Cir.), cert. denied, 469 U.S. 881 (1984); *Texas Util. Co. v. Santa Fe Indus., Inc.*, 553 F. Supp. 106, 111-12 (N.D. Tex. 1982). The narrower coverage relieves the Court of the burden of releasing Brown and Stewart if they should leave JSI or change jobs there.

40. The first amendment guarantee of freedom of speech does not impede the remedy of injunctive relief. *Accord Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988), cert. denied, 109 S. Ct. 3166 (1989); *Jew v. University of Iowa*, 749 F. Supp. 946, 961 (S.D. Iowa 1990); *cf. EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067, 1070 (11th Cir. 1990) (upholding injunction directed to racially abusive language in workplace, without addressing free speech issues).

(a) First, JSI has disavowed that it seeks to express itself through the sexually-oriented pictures or the verbal harassment by its employees. No first amendment concern arises when the employer has no intention to express itself, see *Sage Realty*, 507 F. Supp. at 610 & n.17, and JSI's action in limiting the speech options of its employees in the workplace, see FOF ¶¶ 20-21, establishes that the company may direct an end to the posting of materials without abridging its employees' free speech rights, *cf. May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1110 (7th Cir. 1986) (because "workplace is for working," employer may lawfully withhold its consent for employees to engage in expressive activities).

(b) Second, the pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment. See

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remedy. Accordingly, since backpay follows from reinstatement, the liability for backpay falls on the shoulder of the employer who reinstates the victim of discrimination, the corporate employer defendant.

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Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[P]otentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); Strauss, *Sexist Speech in the Workplace*, 25 Harv. C.R.-C.L. L. Rev. 1, 38-41 (1990). In this respect, the speech at issue is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail, of which there can be no doubt of the authority of a state to punish. *E.g.*, *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987) (threat to kill the President is not protected by first amendment); *United States v. Shoulberg*, 895 F.2d 882, 886 (2d Cir. 1990) (threats to intimidate witnesses); *see generally* Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 Nw. U.L. Rev. 1081 (1983); Greenawalt, *Speech and Crime*, 1980 Am. B. Found. Res. J. 645. This treatment is consistent with the holding of *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973), that a ban on discriminatory help-wanted advertisements did not offend the first amendment. *See also* Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 Wash. & Lee L. Rev. 171, 197 (1990) (transactional setting of sexual harassment opens sexist speech to regulation); *cf. Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir.) (casual chit-chat while working is not protected speech), *cert. denied*, 111 S. Ct. 147 (1990).

(c) Third, the regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech. *See* Strauss, *supra*, at 46 ("[B]anning sexist speech in the workplace does not censor such speech everywhere and for all time."). The standard for this type of regulation requires a legitimate governmental interest unrelated to the suppression of speech, content neutrality, and a tailoring of the means to accomplish this interest. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest. *See Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (eliminating discrimination against women is compelling governmental interest); *Roberts*, 468 U.S. at 626 (compelling governmental interest lies in removing barriers to economic advancement and political and social integration that have historically plagued women). Given the circumstances of the JSI work environment, the method of regulation set forth in the order narrowly tailors the regulation to the minimum necessary to remedy the discrimination problem. To the extent that the regulation here does not seem entirely content neutral, the distinction based on the sexually explicit nature of the pictures and other speech does not offend constitutional principles. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986); *see also* Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589, 616-17.

(d) Fourth, female workers at JSI are a captive audience in relation to the speech that comprises the hostile work environment. "Few audiences are more captive than the average worker. . . . Certainly, if employer-employee relations involve sufficient coercion that we justify regulation in other contexts, then this coercion does not suddenly vanish when the issue is submission to racist or sexist speech." Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L.J. 375, 423-24. The free speech guarantee admits great latitude in protecting captive audiences from offensive speech. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 487 (1988); *FCC v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978) (plurality opinion); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (plurality opinion).

(e) Fifth, if the speech at issue is treated as fully protected, and the Court must balance the governmental interest in cleansing the workplace of impediments to the equality of women, the latter is a compelling interest that permits the regulation of the former and the regulation is narrowly drawn to serve this interest. *Cf. United States v. Paradise*, 480 U.S. 149, 171-85 (1987) (performing similar analysis for race-conscious remedy to race discrimination). Other first amendment rights, such as the freedom of association and the free exercise of religion, have bowed to narrowly tailored remedies designed to advance the compelling governmental interest in eradicating employment discrimination. *See, e.g.*, *Rotary Int'l*, 481 U.S. at 548-49; *EEOC v. Pacific Press*, 676 F.2d 1272, 1280-81 (9th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477, 488-89 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *see also Ellis v. Brotherhood of Ry. Airline & S.S. Clerks*, 466 U.S. 435, 455-56 (1984) (governmental interest in industrial peace justifies interference with dissenting employees first amendment rights resulting from allowing union shop).

(f) Sixth, the public employee speech cases lend a supportive analogy. If this Court's decree is conceptualized as a governmental directive concerning workplace rules that an employer must carry out, then the present inquiry is informed by the limits of a governmental employer's power to enforce workplace rules impinging on free speech rights.

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in the public employee speech cases, the interests of the employee in commenting on protected matters is balanced against the employer's interests in maintaining discipline and order in the workplace. *See, e.g., Finch v. City of Vernon*, 877 F.2d 1497, 1502 (11th Cir. 1989). When an employee's exercise of free expression undermines the morale of the workforce, the employer may discipline or discharge the employee without violating the first amendment. *See, e.g., Bryson v. City of Waycross*, 888 F.2d 1562, 1565-67 (11th Cir. 1989). Analogously, the Court may, without violating the first amendment, require that a private employer curtail the free expression in the workplace of some employees in order to remedy the demonstrated harm inflicted on other employees. *Cf. McMullen v. Carson*, 568 F. Supp. 937, 943-46 (M.D. Fla. 1983) (finding no first amendment violation in discharge of KKK member from police force because *inter alia* internal discipline and morale were threatened by potential for racial confrontations), *aff'd*, 754 F.2d 936 (11th Cir. 1985); *accord Rankin*, 483 U.S. at 391 n.18.

(g) Finally, defendants' reliance upon *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *sum. aff'd*, 475 U.S. 1001 (1986), is misplaced. Two concerns dominate that case. One is the broad definition of "pornography" in the Indianapolis ordinance. See 771 F.2d at 332. This issue is not present in this case because the affected speech, if it is speech protected by the first amendment, is reached only after a determination that a harm has been and is continuing to be inflicted on identifiable individuals. The second concern raised in *Hudnut* is the underlying proposition of the Indianapolis ordinance that pornography conveys a message that is always inappropriate and always subject to punishment, regardless of the context in which it appears. *See id. at 327-32*. In this case, the context of the speech is the heart of the cause of action and the remedy goes no further than to regulate the time, place, and manner of the offensive speech. *Cf. Bryson*, 888 F.2d at 1567 (public employee may be discharged lawfully for uttering on-job speech which would be protected fully if uttered off-duty and in private).

41. The National Labor Relations Act does not impede the grant of injunctive relief to require a policy and procedures to handle sexual harassment complaints. The Court does not perceive that the obligations imposed by the policy and procedures are inconsistent with the collective bargaining agreement between JSI and Local 806 of the International Brotherhood of Boilermakers. See Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, 43 Arb. J. 31, 35 (Dec. 1988) (arbitrators generally sustain discipline arising from sexually harassing behavior of the type experienced at JSI); *see also Newsday, Inc. v. Long Island Typographical Union, No. 915*, 915 F.2d 840, 843-45 (2d Cir. 1990) (vacating arbitrator's award reinstating sexual harasser because arbitrator disregarded public policy against sexual harassment in workplace). The unilateral institution of sexual harassment policies by JSI in 1980 and 1987 suggests that the company does not view the area as one subject to bargaining. Defendants' argument regarding the failure to join the union as a party is not well-taken. Joinder of the union in a discrimination suit is not necessary where the relief does not compel revision of the collective bargaining agreement, but only affects the application of its neutral terms to individuals. *See Karan v. Nabisco, Inc.*, 78 F.R.D. 388, 401-02 (W.D. Pa. 1978); *accord Forsberg v. Pacific N.W. Bell Tel. Co.*, 622 F. Supp. 1147, 1150 (granting reconsideration to 623 F. Supp. 117 (D. Ore. 1985), *aff'd on other grounds*, 840 F.2d 1409, 1420 (9th Cir. 1988) (appellate court expressly declined to rule on joinder issue); *Hutcheson v. Tennessee Valley Auth.*, 604 F. Supp. 543, 548-49 (M.D. Tenn. 1985). Plaintiff alleged no wrongdoing by the union and she seeks, at most, only to clarify the application of the nondiscrimination and just cause clauses within the collective bargaining agreement. Under these circumstances, JSI's apparent concern about conflicting obligations placed the onus on it to join the union as a party. An employer may be required to grant relief to victims of discrimination that conflicts with expectations otherwise created by a collective bargaining agreement. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 774-79 (1976); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1237 (6th Cir. 1980). To the extent that the employer incurs conflicting obligations due to its compliance with a decree to remedy past discrimination, the burden of reconciling the conflict falls on the employer, not the victims of discrimination. *See W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 768-70 (1983); *see also Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180, 2187 (1989).

42. The right of unionized employees to representation during some investigatory interviews, based in § 7 of the NLRA, *see NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-64 (1975), does limit the procedures that the Court may order. The proposal submitted by plaintiff and adopted by the Court, however, does not impose any restriction on the right to representation during investigations. The requirement of confidentiality where possible does not exclude the lawful role of the union in representation of its members. The policy and

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procedures should be implemented in a fashion that does not abridge Weingarten rights.

43. Based on the foregoing, the Court will affirmatively enjoin defendant JSI to adopt, implement, and enforce a policy and procedures for the prevention and control of sexual harassment, substantially in the form proposed by plaintiff. The Court will set forth in this order its modifications of the proposed policy and procedures. In addition, JSI will have thirty (30) days in which to submit any specific objections that relate to its ability to implement and enforce the policy and procedures, as modified. The Court grants this time for the limited purpose of raising issues in the practical execution of its mandate; the objections should not concern the substance of it. Moreover, the Court expects that the parties will confer about any potential objections that JSI will lodge and that they will work in good faith to craft a solution to the legitimate concerns that JSI may identify. It is the opinion of the Court that, at this stage of the proceedings, JSI does not waive or otherwise prejudice any objections previously raised to the proposed remedy by working with plaintiff to shape a workable remedy. The judgment in this case is not final until such time as the Court rules on any objections that JSI submits or JSI informs the Court that it has no objections, either by the passage of the allotted time or by formal notice filed with the Court.

44. The scope of the policy and procedures to be adopted by JSI is as follows.

(a) Plaintiff's proposed Sexual Harassment and Retaliation Policy (Exhibit A to Appendix II of plaintiff's Pretrial Brief) shall be adopted by JSI in full. The policy shall receive the widest form of distribution, including publication in the company's work rules book, posting throughout the shops, and distribution to the workers directly, as explained in plaintiff's proposed Sexual Harassment and Retaliation Procedures and Rules for Education and Training (Exhibit E to Appendix II of plaintiff's Pretrial Brief).[*]

(b) JSI shall adopt an equivalent to plaintiff's proposed Sexual Harassment and Retaliation - Statement of Prohibited Conduct (Exhibit B to Appendix II of plaintiff's Pretrial Brief) and likewise ensure wide distribution. JSI need not adopt word-for-word plaintiff's proposal, but the statement must cover the same subjects, with the exception of the second-to-last paragraph regarding conduct away from work,[*] and must be calculated to communicate clearly the prohibitions to JSI employees.

(c) JSI shall adopt an equivalent to plaintiff's proposed Sexual Harassment and Retaliation - Schedule of Penalties for Misconduct (Exhibit C to Appendix II of plaintiff's Pretrial Brief). The schedule shall reflect the seriousness of sexually harassing behavior, but JSI may integrate the levels of discipline and progression thereof to match its treatment of other serious workplace misconduct.

(d) Plaintiff's proposed Procedures for Making, Investigating and Resolving Sexual Harassment and Retaliation Complaints (Exhibit D to Appendix II of plaintiff's Pretrial Brief) provides a model that JSI shall adopt except for the provision requiring an independent investigator. The Court does not preclude JSI from voluntarily undertaking to employ an independent investigator; the modification is intended solely to lift that aspect of the proposal as a requirement. The Court is not persuaded that the sexual harassment reporting system needs a permanent outside monitor to guarantee its performance or instill employee confidence. The Court will require, however, that plaintiff's counsel or a representative of the Court shall be given reasonable access to inspect for compliance.

(e) Plaintiff's proposed Sexual Harassment and Retaliation Procedures and Rules for Education and Training (Exhibit E to Appendix II of plaintiff's Pretrial Brief) has four distinctive parts. The Court will require JSI to adopt only the first part, concerning education and training.

(f) JSI shall provide the Court, with its equivalent to the Statement of Prohibited Conduct and the Schedule of Penalties no later than thirty (30) days from the entry of this order. JSI may elect to adopt the plaintiff's proposals in lieu of its own by filing a notice with the Court stating as much.

45. In Title VII actions, prevailing plaintiffs may recover reasonable attorney fees as a part of costs. 42 U.S.C. § 2000e-5(k). Absent special circumstances, the court should award

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[*] The Court recognizes that the versions of Exhibit B and Exhibit E attached to plaintiff's proposed findings of fact and conclusions of law differ in some small ways from the versions included with the pretrial brief. Regarding Exhibit B, the differences are truly minor and not of consequence because JSI is charged with adopting an equivalent, not a word-for-word copy. Regarding Exhibit E, the relevant differences involve the identification of McIlwain by name in the later-filed version, whereas the version from which the Court operates identifies the Chief Executive Officer/President as an office. The version used by the Court is preferable because McIlwain is not personally liable and no longer holds the relevant office.

[*] The Court has ruled that this type of conduct is outside the issues in this case and therefore it is inappropriate to include it in the relief ordered herein. JSI is not barred from voluntarily inserting similar language in its statement or developing a separate policy statement on the matter.

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reasonable attorney fees. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978). No such circumstances exist in this case; accordingly, plaintiff is entitled to recover her costs and attorney fees in this action. Because the type of award follows the award of nominal damages, *see Huddleston*, 845 F.2d at 905; *Henson*, 682 F.2d at 905, it is assessed only against JSI. The application for attorney fees should address the factors for evaluating the reasonableness of a request developed in *Norman v. Housing Authority*, 836 F.2d 1292 (11th Cir. 1988), and *Perkins v. Mobile Housing Board*, 847 F.2d 735 (11th Cir. 1988). Because some of plaintiff's counsel is affiliated with an out-of-town public interest litigation group, attention also should be directed to Judge Thomas' opinion in *Dunn v. The Florida Bar*, 726 F. Supp. 1261, 1279-80 (M.D. Fla. 1989), *aff'd on other grounds*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 46 (1990).

In accordance with the foregoing, it is hereby

ADJUDGED:

That judgment shall be entered in favor of plaintiff Lois Robinson and against defendants Jacksonville Shipyards, Inc., Lawrence Brown, and John Stewart on the claim made pursuant to Title VII of the Civil Rights Act of 1964;

That the action shall be dismissed as to defendant John Kiedrowski;

That judgment shall be entered in favor of defendants Arnold McIlwain, Elmer L. Ahlwardt, Everette P. Owens, and Ellis Lovett and against plaintiff on the claim made pursuant to Title VII of the Civil Rights Act of 1964;

That judgment shall be entered in favor of all defendants and against plaintiff on the claim made pursuant to Executive Order No. 11246;

That injunctive relief shall be issued against defendant Jacksonville Shipyards, Inc. in the form described in the Conclusions of Law;

That nominal damages shall be assessed against defendant Jacksonville Shipyards, Inc.;

That plaintiff shall be awarded her reasonable costs and attorney fees from defendant Jacksonville Shipyards, Inc.; and

That a separate order will be entered regarding the foregoing matters.

DONE AND ORDERED in Chambers at Jacksonville, Florida, the 18th day of January 1991.

Howell W. Melton
UNITED STATES DISTRICT JUDGE

-- End of Section D --

Published by THE BUREAU OF NATIONAL AFFAIRS, INC., Washington, D.C. 20037

Chairman FORD. Ms. Morris.

STATEMENTS OF JACQUELINE MORRIS, BONNE TERRE, MISSOURI, ACCOMPANIED BY MICHAEL HOARE, ESQ.; NANCY O'MARA EZOLD, ESQ., PHILADELPHIA, PENNSYLVANIA; DR. FREADA KLEIN, KLEIN ASSOCIATES, BOSTON, MASSACHUSETTS

Ms. MORRIS. Thank you.

Good morning. My name is Jackie Morris. I would like to thank the committee for inviting me to testify this morning about the need for a damages remedy in Title VII cases. In 1981, I was hired as a machinist by the American National Can Corporation to work in the mold repair department at the company's Pevely, Missouri, a glass bottling manufacturing plant. My job was to prepare and maintain the molding used to make glass bottles.

At first, my department was understaffed and I worked 12 to 14 hours a day, seven days a week, to keep the plant running. Over time the department grew to 17 employees. I had the most seniority in the department and trained many of the new employees. Since coming to work at the plant, my performance ratings have all been good or excellent. During most of this time, I was the only woman in the department.

Beginning in 1984, my co-workers and my supervisors began engaging in a campaign of sexual harassment that included the following incidents: On more than one occasion the manager of forming operations for the plant touched my buttocks, told me that I had a nice ass and that he would like to have a piece of that.

At one staff meeting, I asked my supervisor where I should sit and he responded by moving my head down while saying something to the effect that you might as well sit underneath my desk since that's where you do your best work.

On more than one occasion my immediate supervisor touched my breast, touched my buttocks, made remarks to me such as, "Didn't you get any last night?" or "Do you spit or swallow?" and made references to my breasts and buttocks.

A number of offensive materials were left at my work station, including a clay replica of a penis with steel wool testicles and a semen-like substance on it; a pair of women's underwear with a sanitary napkin having a reddish substance on it with a note that said something like, "Jackie, have you lost this?"; a welded figure of a man with a penis; a sausage with a note that said, "Bite me, baby"; a picture of an erect penis; a pile of a semen-like substance on my toolbox; and Playboy-type pictures left once or twice a week.

I was tremendously embarrassed and offended by these incidents, but felt I had nowhere to turn. My supervisors, the people I complained to, were harassing me themselves. I could file a union grievance, but if the union did not want to pursue it beyond the first step, I was helpless to take it further. My union representatives were also my co-workers and for all I knew were responsible for some of the incidents I described. Once, when I had tried to obtain evidence of some harassment by taking pictures, my supervisor confiscated my camera and I nearly lost my job.

The company had no policy against sexual harassment and there was no procedure for complaining about it nor any protection for the victims of harassment. They thought the harassment was just horseplay and pranks.

Finally, I decided I had to go outside the company for help. All I wanted was for the harassment to stop. I filed a charge of discrimination with the EEOC in July of 1986. After I filed the complaint, however, the harassment escalated substantially.

At various times, I found the words "bitch," "slut" and "whore," and "Jackie blows heads" written on my desk or near my work area; a picture which included a nude woman touching her breast was left at my work station with a note that said, "You should be doing this instead of a man's job;" a substance which smelled like urine was put in the air line of my air compressor; a semen-like substance was left on the chair at my work station; over $1,000 worth of my tools were stolen and a tin can marked "Mold Shop Missing Tool Relief Fund" was left at my work station with a penny in it. On one occasion, I found a large replica of an erect penis at my work station.

The harassment increasingly affected my health, and I missed lots of days of work. In 1986 and 1987, I suffered from nervousness, sleeplessness, blotches and welts on my legs and back, and breathing difficulties. When I left work for two weeks at the suggestion of my doctor these symptoms improved, but they returned once I went back to work. The company's own doctor examined me and concluded that my physical problems were most likely due to what he called "interpersonal conflict" at work.

I finally resigned in March of 1987 because I felt unprotected at work, because it was clear to me that the company was not going to do anything to end the harassment and because my doctor told me I was going to have a nervous breakdown if I didn't quit.

In December of 1989, a Federal judge held that I had been subjected to unwelcome sexual harassment for at least 2½ years in violation of Title VII of the Civil Rights Act of 1964. The judge expressly found in his findings of fact that I had been subjected to each of these incidents that I have just described both before and after I filed a complaint. The judge also decided that as a result of this treatment I became so ill that I ultimately left my employment; thus, the judge concluded that I had been constructively discharged.

The court also concluded the company was responsible for what had happened to me. The judge held that the company was, at best, indifferent to my situation. But even though he held the company liable for violating Title VII, he only awarded me $16,000 in back pay and interest for work I missed. I received nothing for the pain, suffering and humiliation that I endured for years at the hands of my co-workers and my supervisors.

I was not the only victim of harassment at the Pevely plant. For example, there was another female in my department, but she resigned in April of 1986, specifically writing on her company forms that she was quitting due to harassment. In addition, after I won my case, some of the plant's women workers asked me for my attorney's phone number. Before that, they had been afraid to speak out about what was happening to them for fear they would lose their jobs.

I returned to work in March of 1988 and have been there since then. Despite the difficulties I have encountered, I have no choice but to stay. When I left the job in 1987, I was unable to get another job as a machinist. Many of the companies I contacted laughed when I told them I was a machinist, and they would say things like "Oh, you're calling for your husband?" I was forced to work as a waitress for $2.65 an hour, as opposed to $12.86 I was making as a machinist.

As painful it is, economical necessities force me to continue working here in order to make my mortgage payments and car payments. Today, the situation remains far from acceptable. Although the company promised that I would not have to work with my old supervisor, when I returned to work, I was put right next to him. The company has never apologized or said, "What could we have done?" or "What can we do now?" Instead, I have learned that the company told many of my co-workers that if they talked to me they would lose their jobs. I have been told that the plant manager has said, "I'll see that she gets what is coming to her." I believe that the company would treat people better if damages were available in cases like mine. As it is now, I do not believe sexual harassment is taken seriously.

Thank you.

[The prepared statement of Jackie Morris follows:]

STATEMENT OF JACQUELINE MORRIS
BEFORE THE COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES
FEBRUARY 27, 1991

Good morning. My name is Jackie Morris. I would like to thank the Committee for inviting me to testify this morning about the need for a damages remedy in Title VII cases.

In 1981, I was hired as a machinist by the American National Can Corporation to work in the mold repair department at the company's Pevely, Missouri glass bottle manufacturing plant. My job was to repair and maintain the moldings used to make glass bottles. At first, my department was understaffed, and I worked 12 or 14 hour days, seven days a week, to keep the plant running.

Over time, the department grew to seventeen employees. I had the most seniority in the department and trained many of the new employees. Since coming to work at the plant, my performance ratings have all been "good" or "excellent."

During most of this time, I was the only woman in the department. Beginning in 1984, my co-workers and my supervisor began engaging in a campaign of sexual harassment that included the following incidents:

> On more than one occasion, the manager of forming operations for the plant touched my buttocks, told me that I "had a nice ass" and that he would "like to have a piece of that";
>
> At one staff meeting I asked my supervisor where I should sit, and he responded by moving my head down while saying something to the effect that "you might as well sit underneath my desk since that's where you do your best work";
>
> On more than one occasion, my immediate supervisor touched my breasts, touched my buttocks, made remarks to me such as "didn't you get any last night," and "do you spit or swallow," and made references to my breasts and buttocks;
>
> Numerous offensive materials were left at my work station, including:
>
> > – a clay replica of a penis with steel wool testicles and a semen-like substance on it
> >
> > – a pair of women's underwear with a sanitary napkin having a reddish substance on it with a note that said something like "Jackie have you lost this"
> >
> > – a welded figure of a man with a penis

-- a sausage with a note that said "bite me baby"

-- a picture of an erect penis

-- a pile of a semen-like substance on my toolbox

-- and Playboy-type pictures left once or twice a week

I was tremendously embarrassed and offended by these incidents, but felt I had nowhere to turn. My supervisors, the people I complain to, were harassing me themselves. I could file a union grievance, but if the union did not want to pursue it beyond the first step, I was helpless to take it further. My union representatives were also my co-workers, and for all I knew were responsible for some of the incidents I've described. Once, when I tried to obtain "evidence" of some of the harassment by taking pictures of it, my supervisor confiscated my camera and I nearly lost my job. The company had no policy against sexual harassment and there was no procedure for complaining about it, nor any protection for victims of harassment; they thought the harassment was just "horseplay" and "pranks."

Finally, I decided that I had to go outside the company for help. All I wanted was for the harassment to stop. I filed a charge of discrimination with the EEOC in July 1986. After I filed a complaint, however, the harassment escalated substantially:

> At various times, I found the words "bitch", "slut", "whore" and "Jackie blows head" written on my desk or near my work station;
>
> A picture which showed a nude woman touching her breasts was left at my work station with a note that said "you should be doing this instead of man's job";
>
> A substance which smelled like urine was put in the air line of my air compressor;
>
> A semen-like substance was left on the chair at my workbench;
>
> Over $1,000 worth of my tools were stolen, and later a tin can marked "mold shop missing tool relief fund" was left at my work station, with a penny in it; and
>
> On one occasion, I found a large replica of an erect penis at my work station.

This harassment increasingly affected my health, and I missed a lot of days of work. In 1986 and 1987, I suffered from nervousness, sleeplessness, blotches and welts on my legs and back, and breathing difficulties. when I left work for two weeks at the suggestion of my doctor, these symptoms improved, but they returned once I went back to work. The company's own doctor examined me, and concluded that my physical problems were most likely due to what he called "interpersonal conflicts" at work. I finally resigned in March 1987 because I felt unprotected at work, because it was clear to me that the company was not going to do anything to end the harassment, and because my doctor told me I was going to have a nervous breakdown if I did not quit.

In December 1989, a federal judge held that I had been subjected to unwelcome sexual harassment for at least two and one-half years in violation of Title VII of the Civil Rights Act of 1964. The judge specifically found in his Findings of Fact that I had been subjected to each of the incidents I have just described, both before and after I filed a complaint. The judge also decided that as a result of this treatment, I became so ill that I ultimately left my employment. Thus, the judge concluded that I had been constructively discharged.

The court also concluded that the company was responsible for what happened to me. The judge held that the company was at best indifferent to my situation. But even though he held the company liable for violating Title VII, he only awarded me $16,000 in back pay and interest for work I had missed. I received nothing for the pain, suffering and humiliation I endured for years at the hands of my co-workers and supervisors.

I was not the only victim of harassment at the Pevely plant. For example, the only other female in my department resigned in April 1986, specifically writing on company forms that she was leaving due to harassment. In addition, after I won my case some of the plant's women workers asked me for my attorneys' telephone number. Before that, they had been afraid to speak out about what was happening to them for fear that they would lose their jobs.

I returned to work in March 1988, and have been there since then. Despite the difficulties I have encountered, I have no choice but to stay. When I left the job in 1987, I was unable to get another job as a machinist. Many of the companies I contacted laughed when I told them I was a machinist, and said things like "Are you calling for your husband?" I was forced to work as a waitress for $2.65 an hour, as opposed to the $12.86 an hour I had been earning as the senior machinist at the plant. As painful as it is, economic necessity forced me to continue working there, in order to make my mortgage payments and car payments.

Today, the situation remains far from acceptable. Although the company promised that I would not have to work with my old supervisor, when I returned to work I was put right next to him. The company has never apologized or said "what could we have done," or "what can we do now." Instead, I have learned that the company told some of my co-workers that if they talked to me they would lose their jobs. And I am told that the plant manager has said "I'll see to it that she gets what is coming to her."

I believe that the company would treat people better if damages were available in cases like mine. As it is now, I do not believe sex harassment is taken seriously.

Thank you.

MORRIS v. AMERICAN NATIONAL CAN CORP.

U.S. District Court,
Eastern District of Missouri,
Eastern Division

MORRIS v. AMERICAN NATIONAL CAN CORPORATION, et al., No. 87-1161C(3), December 18, 1989

CIVIL RIGHTS ACT OF 1964

1. Sexual harassment ▸108.415815

Sexual harassment of female employee was "unwelcome," despite employer's reliance on her purported use of profane language, her frequent use of supervisor's office, and her distribution of religious-oriented materials and statements as provoking challenged conduct at issue, where her use of profane language and greasing of other employees' equipment could be part of her efforts to fit into environment at hand but do not justify harassing conduct that she endured, no witnesses testified that there was relationship between what she did and materials that she received, she expressed distaste for items and materials that she received, and she expressed embarrassment at language that she endured from her supervisor.

2. Sexual harassment ▸108.415931

Fact that some of harassing conduct directed at female employee and materials that she received were not sexual in nature does not mean that they were not based on sex, where the most offending conduct was clearly sexual in nature, same animus that generated note "This is what you should be doing instead of a man's job" more likely than not generated broken fans and radios, stolen tools, vandalized toolboxes, and the like, and employer has not suggested that any male employee was subjected to comparable campaign of harassment.

3. Sexual harassment ▸108.412865

Conduct by female employee's supervisor and co-workers was consistent enough and pervasive enough to alter conditions of her employment, where employer's doctor expressed opinion that her allergic reactions—which caused her to become so ill that she ultimately left her employment—were more probably due to interpersonal relationships at work than reaction to physical exposure to chemicals and other substances at workplace.

4. Sexual harassment ▸108.415903

Female employee has shown that she was subjected to sexually hostile environment by her supervisor and co-workers by establishing that she consistently advised supervisor about many individual incidents, that it was not clear that she could have done more because only available grievance procedure does not allow individual employee to go beyond first step without support of local union shop committee, and neither policy statement in collective bargaining contract nor any other corporate policy statement expressly prohibited sexual harassment; fact that supervisor was incapable of communicating, or unable to communicate, to other supervisory personnel actual nature of materials and incidents should not excuse employer's inattention to such materials and incidents.

5. Sexual harassment ▸108.415930

Neither employer nor supervisor took remedial actions that were reasonably calculated to be effective in ending sexual harassment of female employee, where they unreasonably relied on her co-workers to police themselves even though some of them were most likely culprits, they failed to interview female employee about harassment, they apparently expected that occasional mild rebukes about "horseplay" and "pranks" would put stop to serious harassment, it was particularly unreasonable for employer to leave supervisor in control of department when he himself had engaged in sexually harassing conduct and his efforts to stop harassment had not been effective over course of two and one-half years, and their efforts were never completely effective in putting end to harassment.

6. Sexual harassment ▸108.415909 ▸108.415911

Employer and supervisor are liable to female employee for conditions that she experienced at work and for constructive discharge, where they were at best indifferent to her situation and at worse intended to let it run its course with foreseeable possibility that she would eventually resign.

7. Sexual harassment ▸108.4128 ▸108.415927

Female employee who was sexually harassed for at least two and one-half years before she went on sick leave and thereafter resigned was constructively discharged, where harassment continued up to within few weeks of date on which she went on sick leave, conclusions of employer's doctor support her contention that stress and tension that she experienced at work because of harassment and threat of harassment were source of her health problems, employer's ineffectual measures failed to curtail harassment, and reasonable person would have found conditions intolerable, particularly when they did not abate within reasonable time after employer received EEOC charge.

8. Back-pay period ▸210.304 ▸210.451

Constructively discharged employee is entitled to back pay from effective date of her resignation until date on which employer made unconditional offer of reinstatement, together with interest at annual rate of nine percent.

9. Back pay ▸210.051 ▸210.451

Constructively discharged employee will be compensated for 11.5 days of work that she missed because of pretrial preparation and trial, but because there was no proof of which days were missed, she will not be awarded prejudgment interest on this amount.

10. Retroactive seniority ▸215.301

Constructively discharged employee who subsequently was reemployed is entitled to seniority retroactive to initial date of hire.

11. Vacation benefits ▸225.301

Constructively discharged employee will not be awarded any vacation-related relief, where there was no proof of vacation to which she would otherwise be entitled and no proof of value of any such vacation benefit.

12. Sexual harassment ▸225.315

Employer that tolerated sexual harassment of female employee is ordered to develop staff training program, to establish grievance procedure for sexual harassment occurring in workplace, to publicize this procedure, and to apply it to all employees.

Michael J. Hoare, St. Louis, Mo., for plaintiff.

James P. Mannion, Jr., and Sabrina M. Wrenn (Bryan Cave McPheeters & McRoberts), St. Louis, Mo., for defendants.

Full Text of Opinion

WILLIAM L. HUNGATE, District Judge. — This matter is before the Court to determine the merits of plaintiff's claims after a five-day bench trial.

Pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., plaintiff, a female employee of defendant corporation, contends that she was subjected to unlawful sexual harassment by defendant supervisors and other employees, and that her complaints of the harassment were not effectively resolved, resulting in plaintiff's constructive discharge in March 1987. Plaintiff was eventually reinstated in March 1988, and she claims she is entitled to lost wages, lost benefits, and seniority retroactive to her initial date of employment in 1981. Defendants counter they are not liable because (a) they had no notice or knowledge of problems encountered by plaintiff until she filed an administrative charge, and (b) once they had notice or knowledge of the problem(s), they took immediate steps to ameliorate the problems. Only Counts I through III of the amended complaint are now before the Court. *See* order dated September 30, 1988.

Having carefully considered the pleadings, testimony, witnesses, documents, and evidence, and being fully advised in the premises, the Court renders the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff Jacquelyn L. Morris is a female citizen of the United States. She has been employed by defendant corporation to work at its facility in Pevely, Missouri, known as the Foster-Forbes Glass Division ("Foster-Forbes").

2. Defendant American National Can Corporation is a Delaware corporation doing business in Missouri, in part through Foster-Forbes where glass containers are manufactured. Defendant is an employer within the meaning of Title VII.

3. Plaintiff has worked as a machinist (or mold-maker) in the mold department at Foster-Forbes from on or about April 13, 1981, through March 30, 1987, the effective date of her resignation. At the time of her resignation, she was the employee in the mold department having the most seniority. She was rehired on March 8, 1988, and continues to work in the mold department at present.

4. During the period prior to April 1986, plaintiff was one of only two females in the mold department. After April 1986, she was the only female in that department. Since 1984, the mold department has had a total of either eleven or twelve employees in it.

5. Since 1983, defendant David Scott has been the Manager of Forming Operations at Foster-Forbes. He was the immediate supervisor of defendant Glenn Besore during the relevant time period.

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6. During the relevant time period, defendant Glenn Besore was the Supervisor of Mold Repair at Foster-Forbes. In this position, Mr. Besore was the immediate supervisor of plaintiff and other mold department employees. As a result of his request, Mr. Besore is now a non-supervisory employee in the mold department at Foster-Forbes.

7. On July 16, 1986, plaintiff filed the first of two administrative charges of sex discrimination against defendants. Plaintiff timely filed this lawsuit after receiving her right-to-sue letter.

8. The credible testimony establishes that between 1984 and July 16, 1986, plaintiff was subjected to the following conduct by defendant Scott: Mr. Scott commented on more than one occasion that plaintiff "had a nice ass" and that "he'd like to have a piece of that." Additionally, Mr. Scott touched plaintiff's buttocks on occasion. While Mr. Scott denied these statements and acts, the denials are not clearly credible since other employees testified to seeing such conduct. This conduct did not continue after the filing of plaintiff's first administrative charge.

9. The credible evidence establishes that between 1984 and July 14, 1986, plaintiff was subjected to the following conduct by defendant Besore: On more than one occasion, Mr. Besore would make comments such as "(didn't) you get any last night," "do you spit or swallow," or "you have the whitest teeth I ever came across." The latter two comments were reported to be punch lines from dirty jokes related in the mold department. Plaintiff thought they were references to oral sex acts. Additionally, Mr. Besore would make references to plaintiff's weight, her "big butt" or her "boobs." During one staff meeting, Mr. Besore responded to plaintiff's inquiry about where she should sit by moving plaintiff's head down while saying something to the effect that she "might as well sit underneath his desk since that's where everybody says you do your best work." On one occasion when plaintiff would not leave his office while he was in a meeting with a salesperson, Mr. Besore said to her something like: "You want to go out with [the salesperson] tonight? . . . You want to show him a good time or something?" Mr. Besore explained he was trying to embarrass her into leaving his office rather than reprimanding her in front of the salesperson. Once Mr. Besore touched plaintiff's breasts and plaintiff responded by slapping him. On several occasions, Mr. Besore would tap plaintiff's and other employees' buttocks while remarking to the employees that they should get on with or back to their work.

10. Plaintiff was embarrassed or offended by these acts and comments but did not say anything about them to Mr. Besore, to Mr. Scott or to any other managerial staff at defendant corporation.

11. Before plaintiff filed the July 16, 1986, administrative charge, plaintiff received at or near her work station:

(a) a sausage with a note "bite me baby" (found in her purse on November 4, 1985);

(b) a clay replica of a penis with steel wool testicles and a semen-like substance on it (found in her workbench on April 16, 1986);

(c) a welded figure of a man with a penis (found on an unknown date);

(d) a pair of women's underwear with a sanitary napkin having a reddish substance on it and with a note attached saying something like "Jackie have you lost this" (found hanging from the light at her workbench in March or April 1986);

(e) a pile of a substance described as "semen-like" (found on her toolbox on June 23, 1986);

(f) a picture of an erect penis (found on her toolbox on July 14, 1986); and

(g) "Playboy-type" pictures (found at her workbench about once or twice a week since 1984).

12. After her first administrative charge was filed on July 16, 1986, plaintiff received the following at or near her work station:

(a) the words "bitch" or "slut" written on her desk (found July 21, 1986);

(b) a large replica of an erect penis apparently made out of a stick and hard glue, along with a note saying: "Hey Jake [sic] — Heard ya got one in your pants the same size. I never knew, think we could get together. —Your Lesbian Friend" (found on her toolbox July 23, 1986);

(c) the words "Jackie blows heads" written on a shelf sign marking where equipment called "blowheads" were kept (found at first on August 7, 1986, and remained for approximately six days);

(d) a picture of a nude woman sitting on the edge of a bathtub and touching her breasts, with a note saying something like "You should be doing this instead of a man's job;"

(e) a cartoon reading "Half ton pickup" with the word "Jackie" written across the chest of the fat woman in the cartoon (found in late August 1986, posted on a bulletin board in the mold department);

(f) a cartoon of five men with handwritten words "Jackie," "suck me asshole," and "full of shit" added to the picture (found on bulletin board near plaintiff's workbench in October 1986);

(g) the words "slut" and "whore" written on a green welding screen (first discovered in October 1986 and remained for approximately one month); and

(h) a sign reading "Jackie — Attention! Because of the outbreak of A.I.D.S. you are no longer required to kiss the boss's ass" (found in mid-October 1986 on a bulletin board in the mold department).

13. Additionally, plaintiff was subject to the following incidents:

(a) in mid-August 1986, plaintiff discovered the wires to her radio had been cut;

(b) at the end of August 1986, plaintiff discovered the fan at her work station had been damaged so that it did not function;

(c) in early September 1986, someone had put black grease in her welding helmet;

(d) in early September 1986, her roller cabinet had been "locktighted" which required the breaking and replacement of the cabinet's lock to fix it;

(e) a few days thereafter, plaintiff noticed the cabinet had been dented;

(f) in early October 1986, plaintiff discovered someone had put a substance smelling like urine in the airline she used;

(g) in October 1986, plaintiff discovered on her toolbox a substance that looked to her like phlegm;

(h) on or about November 13, 1986, plaintiff found what she considered to be a semen-like substance on the chair at her workbench;

(i) sometime during November 1986, someone stole plaintiff's tools having an approximate value of $1000 to $1200;

(j) after the tools were taken, on November 24, 1986, plaintiff found a note saying "Mold shop missing tool relief fund & tax deduction (1986 only)" at her work station with a tin can having one cent in it; and

(k) during January 1987, one of her wooden toolboxes was stolen and on one occasion she was unable to stop employees from throwing cartridges (1-½" rolled and glued sandpaper) at her.

14. Promptly after each incident, except upon receipt of the stick and glue replica of a penis, plaintiff reported the incident to Mr. Besore and asked that he do something to stop the incidents. While Mr. Besore characterized some of the materials received by plaintiff as "sickening," Mr. Besore did not consider any of the incidents as sexual harassment or as anything more than horseplay and pranks to which a number of mold department employees were subjected. Occasionally, during his weekly staff meetings, he would mention that horseplay would not be tolerated. Once or twice, he mentioned to defendant Scott the existence of conflict among mold department employees. On occasion, he would advise Mick Oldham, Manager of Human Relations at Foster-Forbes, of problems with pranks in the mold department. Mr. Besore does not recall specifically describing to Mr. Scott or to Mr. Oldham the precise nature of the materials received by plaintiff, although he may have done so.

Mr. Besore was not present when plaintiff received the stick and glue replica of a penis. Upon learning of that item, Mr. Besore unsuccessfully asked certain employees if anyone knew who was responsible.

15. While plaintiff reported certain incidents (such as the substance found on her toolbox or a substance in her airline) to Mr. Scott, he was not aware until after receipt of the administrative charge of the sexual nature of some of the materials received by plaintiff. From the end of July 1986 to the date of the administrative hearing in December 1986, no sexual materials received by plaintiff were brought to Mr. Scott's attention by plaintiff or others.

16. Prior to the filing of the administrative charge in July 1986, plaintiff had not notified any supervisory personnel above Mr. Scott of the materials she received.

17. Due to Mr. Besore's absence, plaintiff reported the receipt of the stick and glue replica of a penis to William Barrett, the plant manager. Mr. Barrett intimated that such incidents would stop if plaintiff stopped antagonizing the other employees.

18. Mr. Scott and Mr. Besore usually responded to plaintiff's requests that something be done about the materials by telling plaintiff to clean up the material and/or return to her work. Mr. Besore and Mr. Scott noted the conduct might stop if she didn't let it bother her so much. Additionally, plaintiff was repeatedly advised nothing could be done without knowing who was responsible.

19. No person or persons were ever identified as being responsible for the conduct toward or materials left for plaintiff.

20. Defendants indicated that plaintiff may have antagonized other em-

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ployees by visiting Mr. Besore's office frequently, in particular to answer or use the telephone, or by leaving unwanted scriptures at one employee's work station. Additionally, Mr. Besore opined that plaintiff had a tendency to complain a lot. Despite this and other occasional incidents of plaintiff's relatively inappropriate behavior, no one stated that plaintiff invited, instigated, or enticed the receipt of the materials she found or the conduct toward her.

21. After receipt of plaintiff's July 16, 1986, administrative charge, (a) Mr. Oldham asked Mr. Besore and Mr. Scott twice to respond to each of plaintiff's claims; (b) Mr. Besore removed from the plant any magazines from which pictures might be taken; (c) Mr. Oldham met with mold department employees and told them the horseplay and pranks had to stop; (d) Mr. Besore reportedly distributed and posted a memorandum in response to the "AIDS" notice; (d) the union shop committee's aid in discovering who was responsible for the items was solicited; and (e) the installation of a surveillance camera was suggested and rejected.

No managerial staff spoke directly with plaintiff about the basis for the charge.

22. It was not unusual in the mold department to hear dirty jokes or vulgar language; to "goose" other employees; to "grease" employees' chairs, vices, or gloves; to throw objects; to have piles of a substance (variously referred to as "phlegm," a semen-like substance, or "waterless hand cleaner") left at a work area; or to have cartoons referencing various employees posted on the bulletin board. At weekly meetings, management discussed the need to stop this horseplay for safety reasons.

23. From October 1986 to March 1987, plaintiff saw several doctors for "nervousness," "sleeplessness," blotches or welts on her legs and back, and an occasional inability to breath or difficulty breathing. At one doctor's suggestion, she remained away from work for two weeks and her symptoms improved. Two doctors suggested she resign. The company doctor who examined plaintiff prior to her return to work in March 1988 opined that her physical problems were most likely due to "interpersonal conflicts" at the mold department.

24. Plaintiff resigned on March 24, 1987, due to her physical problems, her feeling neither she nor her tools were protected at work, and her feeling no one would do anything to help her.

25. Mr. Scott meets with his supervisors, including Mr. Besore, each morning. Additionally, Mr. Scott makes it a usual practice to tour the mold department on a regular, almost daily basis. After receipt of the July 1986 administrative charge, Mr. Scott asked each of his supervisors, including Mr. Besore, to bring anything to his attention. When he asked Mr. Besore what was going on, Mr. Besore did not mention plaintiff's receipt of sexual materials.

26. No one was aware of any formal or informal company procedure by which an employee could pursue a claim of sexual harassment by co-employees or by supervisory personnel. Defendants intimated that plaintiff was familiar with and could have pursued a union grievance.

27. In April 1986, the other female employee in the mold department quit. At first, she stated she was quitting due to a need to care for her child. The company forms she completed stated she was quitting due to harassment.

28. The week before trial of this case began, there was posted in the men's room at Foster-Forbes a cartoon of a woman lying on her back with her legs spread open. "Jackie" was written on the cartoon.

29. One female employee reported that Mr. Besore had commented "boys will be boys" in a discussion with the witness about the replicas of the penises that plaintiff had received.

30. In the months just before plaintiff's resignation, plaintiff was not at work many days due to sick leave. Plaintiff was on sick leave from approximately February 18, 1987, to the effective date of her resignation.

31. The parties stipulated that a machinist such as plaintiff would be paid as follows:

Hourly Rate	Effective Date
$12.47	3/1/87
12.97	4/1/87
13.17	7/1/87
13.42	9/1/88

32. The Court finds it inappropriate to rely on the wages earned (including overtime) by the machinist plaintiff asserts is the next most senior after plaintiff to determine the amount of plaintiff's lost wages. Mr. Oldham, the custodian of the relevant records, opined that a different employee would be more comparable to plaintiff's wages and benefits. Additionally, although the overtime equalization plan gave each machinist in the mold department the same opportunity to obtain overtime, there was no indication of record either that each such machinist actually achieved equal overtime or that plaintiff had discernible amounts of overtime prior to her resignation.

33. Due to trial preparation and attendance, plaintiff lost $108.00 per day for 11-1/2 days in 1988 and 1989 for a total loss of $1,500.00.

34. On September 8, 1987, defendant corporation unconditionally offered plaintiff reinstatement. On December 18, 1987, plaintiff accepted the offer. On March 8, 1988, plaintiff returned to work at Foster-Forbes.

35. As a machinist at Foster-Forbes, plaintiff is a member of the American Flint Glass Workers Union, AFL-CIO, Local 77 ("Flintworkers"). During 1984 through 1987, the collective bargaining agreements between the Flintworkers and defendant corporation provided in relevant part that neither the corporation nor the union would discriminate against any employee "because of race, color, religion, sex, or national origin." Additionally, those agreements contained a grievance procedure which provides that the union's shop committee shall pursue the complaint through various specified steps if it is not resolved in the initial step. By its terms, the grievance procedure appears to allow the grievant alone to pursue the matter only through the first step.

36. During the relevant time, the defendant corporation did not have an express policy against sexual harassment or a grievance procedure independent of the policy and procedure in the collective bargaining agreements.

Conclusions of Law

A. Jurisdiction and venue are proper in this Court. 28 U.S.C. §§1331, 1343(4), 1391(b); 42 U.S.C. §2000e-5(f)(3).

B. For the most part, this case turns upon the witnesses' credibility. In making the necessary credibility determinations, the Court considered the relationship of the witnesses to the parties, the witnesses' interest in the outcome of these proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe and acquire knowledge of what they were testifying about, and the extent to which the testimony was supported or contradicted by other credible evidence. *Perkins v. General Motors Corp.*, 709 F.Supp. 1487, 1499 [51 FEP Cases 1684] (W.D. Mo. 1989).

C. 42 U.S.C. §2000e-2(a)(1) provides in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."

D. If sexual harassment is sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment, then a violation of Title VII's proscription against sex discrimination has occurred. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 [40 FEP Cases 1822] (1986); *Minteer v. Auger*, 844 F.2d 569, 570 [46 FEP Cases 1173] (8th Cir. 1988). Such harassment occurs when an employer's "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." *Vinson*, 477 U.S. at 65 (quoting 29 C.F.R. §1604.11(a) (1985)); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 [46 FEP Cases 573] (8th Cir. 1988). To prevail on a hostile environment sexual harassment claim, plaintiff must establish:

> (1) [plaintiff] belongs to a protected group; (2) [plaintiff] was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.

Moylan v. Maries County, 792 F.2d 746, 750 [40 FEP Cases 1788] (8th Cir. 1986) (citing *Henson v. City of Dundee*, 682 F.2d 897, 903-05 [29 FEP Cases 787] (11th Cir. 1982)).

Here the parties do not dispute that as a woman plaintiff falls within a protected group. The parties dispute each of the other required elements.

[1] E. The Court finds plaintiff was the subject of unwelcome sexual harassment from 1984 through her resignation in March 1987. To be unwelcome, the employee must not "solicit or invite it, and the [complaining] employee [must] regard[ ] the conduct as undesirable or offensive." *Moylan*, 792 F.2d at 749. While the nature of the work environment might be appropriate to consider, *see Hall*, 842 F.2d at 1017-18; *Perkins* 709 F.Supp. at 1499, a ribald work environment should not excuse nor endorse sexually harassing conduct, *Hall*, 842 F.2d at 1017-18. Indeed, evidence of conduct toward those other than plaintiff may serve to establish the hostility of the environment. *Hall*, 842 F.2d at 1015. Accordingly, the environment in and of itself does not render harassing conduct "welcome."

Plaintiff called Mr. Besore a "fumbell." She stated she was referring to a "curly perm" he had. Mr. Besore didn't know whether she was referring to that or to his alleged inability to deal with other employees in a manner plaintiff reportedly deemed appropriate. Once during an argument, plaintiff referred to another male employee as "dick breath." That nickname has stuck with that employee despite his disapproval of it. On occasion plaintiff greased other employees' equipment.

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The plaintiff's own behavior may, however, be indicative of whether or not the challenged conduct is "unwelcome." *Vinson*, 477 U.S. at 69 ("a complainant's sexually provocative speech or dress [is relevant] in determining whether he or she found particular sexual advances unwelcome"); *Jones v. Wesco Investments, Inc.*, 846 F.2d 1154, 1156 n.4 [46 FEP Cases 1431] (8th Cir. 1988). Here, there is no contention that plaintiff's manner of dress was sexually provocative. Rather, defendants rely on plaintiff's purported use of profane language; plaintiff's frequent use of a supervisor's office; and plaintiff's distribution of religious oriented materials and statements as provoking the challenged conduct at issue here. While the Court cannot condone plaintiff's conduct in the workplace, the Court does not find such conduct sufficiently provocative of the materials and comments plaintiff endured. Plaintiff's use of profane language and the greasing of other employees' equipment could be part of plaintiff's efforts to fit in to the environment at hand. Such conduct, however, does not justify the harassing conduct plaintiff then endured. Importantly, no witnesses opined there was a relationship between what plaintiff did and the materials she received.

Finally, plaintiff expressed distaste for the items and materials she received, and expressed embarrassment at the language she endured from defendant Besore.

Accordingly, the Court finds the challenged conduct toward plaintiff and the materials plaintiff received were "unwelcome."

[2] F. This Court also determines that the harassing conduct and materials were based on sex. Defendants here point out that some of the materials received by plaintiff and some of the conduct directed toward plaintiff were not sexual in nature. This, however, does not make the conduct irrelevant to the inquiry. So long as the Court finds "the incidents of harassment and unequal treatment . . . would not have occurred but for the fact" plaintiff was a woman, the Court may properly consider them in its analysis. *Hall*, 842 F.2d at 1014.

Here, the most offending conduct is clearly sexual in nature. The welded man with an erect penis, the handmade models of penises, and the magazine pictures of a nude woman and of a penis, among other things, clearly have sexual overtones. The "slut," "did you get any last night," and "Jackie blows heads" references are clearly sexual in nature. The broken fans, radios, stolen tools, vandalized toolboxes, and the like, more likely than not were generated by the same animus that generated the note, "This is what you should be doing instead of a man's job." Defendants have not suggested that any male employee was subjected to a campaign of harassment comparable to that of plaintiff. The totality of the circumstances in the workplace, the pattern of harassment to which plaintiff was subjected, and its relatedness to the overtly sexual conduct, all indicate that the so-called non-sexual harassment more likely than not was due to plaintiff's sex. Thus, plaintiff has met the third element of the inquiry.

[3] G. Furthermore, the harassment affected "a term, condition or privilege" of employment. In his report, the doctor selected by defendant corporation opined that plaintiff's allergic reactions, reactions acquired from 1985 and later years, were more probably due to interpersonal relationships at work than a reaction to a physical exposure to chemicals and other substances at the workplace. She became so ill that she ultimately left her employment. Thus, the conduct by Besore and others was consistent enough and pervasive enough to alter the conditions of plaintiff's employment.

The Court does not find, however, that defendant Scott's challenged conduct was sufficiently pervasive or severe to constitute actionable conduct.

[4] H. Plaintiff has provided credible evidence of a sexually hostile environment by co-workers and defendant Besore at Foster-Forbes, Pevely, Missouri, between 1984 and March 1987. Plaintiff has established that she consistently advised her supervisor, Glenn Besore, about many individual incidents. While defendants urge plaintiff should have done more, it is not clear there was more she should do. The only grievance procedure available to her was in the relevant collective bargaining agreements, and that procedure does not clearly allow an individual employee to go beyond the first step without support of the local union shop committee. Moreover, neither the policy statement in the relevant collective bargaining agreements nor any other policy statement of defendant corporation expressly prohibited sexual harassment. The fact that Mr. Besore was incapable of communicating or unable to communicate to other supervisory personnel the actual nature of the materials and incidents should not excuse the employer's inattention to such materials and incidents.

[5] I. Neither defendant corporation nor defendant Besore took remedial actions which were reasonably calculated to be effective in ending the harassment. *See Ways v. City of Lincoln*, 871 F.2d 750, 755 [49 FEP Cases 865] (8th Cir. 1989) (district court finding that employer's efforts were "not impressively effective" in ridding workplace of racially hostile language and incidents was not clearly erroneous). Those defendants unreasonably relied on plaintiff's co-workers to police themselves, although some among them were the most likely culprits. Those defendants failed to interview plaintiff about the harassment. Those defendants apparently expected that occasional, mild rebukes of employees about "horseplay" and "pranks" would put a stop to what, in fact and law, was serious sexual harassment. It was particularly unreasonable for defendant corporation to leave Mr. Besore in a supervisory position over the mold department when he himself had engaged in sexually harassing conduct, and his efforts to stop the harassment of plaintiff were not effective over the course of two and one-half years. Most significantly, defendants' efforts were never completely effective in putting an end to the harassment of plaintiff.

[6, 7] J. The corporate defendant and defendant Besore are liable to plaintiff for both the conditions plaintiff experienced at work and for constructive discharge. Plaintiff has shown that the harassment directed at her continued up to within a few weeks of the date she went on sick leave. The conclusions of corporate defendant's doctor support plaintiff's contention that the stress and tension she experienced at work because of the harassment and the threat of harassment were the source of her health problems. Although the harassment plaintiff experienced in the weeks just prior to her sick leave may not have been overtly sexual, it was part of a continuing campaign of clearly sexual harassment which dated back at least two and one-half years, and which was directed at her because she is a female. Plaintiff has proven that she was subjected to unlawful sexual harassment which defendants' ineffectual measures failed to curtail. Under these circumstances, the Court is left with the impression that defendant corporation and defendant Besore were at best indifferent to plaintiff's situation, and at worst intended to let it run its course with the foreseeable possibility that plaintiff would eventually resign. A reasonable person would have found the conditions intolerable, particularly when they did not abate within a reasonable time after the defendant corporation received the administrative charge. Thus the Court finds defendant corporation's and defendant Besore's conduct was deliberate, *see Taylor v. Jones*, 653 F.2d 1193, 1199 [28 FEP Cases 1024] (8th Cir. 1981) (on constructive discharge claim, employer liable for black employee's resignation due to racial atmosphere resulting from employer's deliberate acts), or "intentional," *see Craft v. Metro-Media, Inc.*, 766 F.2d 1205, 1217 [38 FEP Cases 404] (8th Cir. 1985) (on constructive discharge claim, employer must be found to have taken actions with intent to force employee to quit), *cert. denied*, 475 U.S. 1058 [40 FEP Cases 272] (1986), for purposes of plaintiff's constructive discharge claim.

K. Plaintiff's entitlement to a full measure of relief includes, but is not limited to, a seniority date retroactive to her initial date of hire, "back pay from the date of discharge . . . and any increases she would have received within that period . . . [and] any fringe benefits she would have received," *Paxton v. Union National Bank of Little Rock*, 688 F.2d 552, 567 [29 FEP Cases 1233] (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 [31 FEP Cases 824] (1983), prejudgment interest, *Washington v. Kroger Co.*, 671 F.2d 1072, 1078 [29 FEP Cases 1739] (8th Cir. 1982), and appropriate injunctive relief.

[8] L. Plaintiff is entitled to receive backpay from the effective date of her resignation (March 30, 1987) until the defendants' unconditional offer of re-employment made on September 8, 1987. *Ford v. EEOC*, 458 U.S. 219 [29 FEP Cases 121] (1982). Thus, plaintiff is entitled to the following amount in backpay:

$ 199.52	($12.47/hr. × 8 hrs. = $99.76 × 2 days for 3/30/87 and 3/31/87)
311.28	($12.97/hr. × 8 hrs = $103.76 × 3 days for 4/1/87, 4/2/87, and 4/3/87)
6,225.60	($12.97/hr. × 40 hours per week = $518.80 × 12 weeks for 4/6/87 through 6/26/87)
207.52	($12.97/hr. × 8 hrs. = $103.76 × 2 days for 6/29/87 and 6/30/87)
5,268.00	($13.17/hr. × 40 hours per week = $526.80 × 10 weeks for 7/1/87 through 9/8/87)
$12,211.92	

M. Plaintiff is also entitled to an amount of prejudgment interest on the backpay awarded. The Court finds a nine percent annual interest rate reasonable and proper. Thus, the Court awards plaintiff:

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$ 2,198.14	($12,211.92 × .09 interest rate = $1,099.07 × 2 years for 9/8/87 through 9/8/89)
274.74	($1,099.07 divided by 12 months/year = $91.58 × 3 for 9/8/89 through 12/8/89)
30.10	($1,099.07 divided by 365 days/year = $3.01 × 10 for 12/8/89 through 12/18/89)
$ 2,502.98	

[9] N. Plaintiff will also be compensated for the 11.5 days of work she missed for pretrial preparation and trial, or a total of $1,500.00. Since there was no proof of which days were missed, the Court will not award prejudgment interest on this amount.

[10] O. Plaintiff is also entitled to seniority retroactive to the initial date of hire in 1981.

[11] P. Since there was no proof of vacation to which plaintiff would otherwise be entitled and no proof of the value of any such vacation benefit, the Court will not award plaintiff any vacation-related relief.

[12] Q. Additionally, defendant corporation shall (a) develop a staff training program; and (b) establish a grievance procedure for sexual harassment occurring in the workplace. The grievance procedure shall be posted or otherwise publicized and shall apply to all employees. Within thirty days of the date of this order, the proposed training program, grievance procedure, and method(s) for publicizing the grievance procedure shall be submitted to the Court and served on plaintiff. Within fifteen days thereafter, plaintiff shall file any response(s) she may have to defendant corporation's proposals.

R. On or before December 28, 1989, plaintiff's attorney shall file a documented request for attorney's fees and expenses, along with a brief (no more than fifteen pages in length) citing argument and authority in support of the request. On or before January 5, 1990, defendants may respond to plaintiff's documentation and brief filed in support of plaintiff's request for fees and expenses.

Judgment

A memorandum dated this day is hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff Jacquelyn L. Morris take nothing by her cause of action against defendant David Scott and the same is dismissed with prejudice at plaintiff's costs.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff Jacquelyn L. Morris recover of defendants American National Can Corporation and Glenn Besore, jointly and severally, a total of $16,214.90 ($12,211.92 in backpay; $2,502.98 in prejudgment interest on the backpay; plus $1,500.00 for eleven and one-half days for pretrial preparation and trial), post-judgment interest thereon at the legal rate, attorney's fees, and costs.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff Jacquelyn L. Morris shall be awarded seniority retroactive to the initial date of hire in 1981.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that defendant American National Can Corporation develop a staff training program and a grievance procedure to address sexual harassment in the workplace. The grievance procedure shall be posted or otherwise publicized and shall apply to all employees.

IT IS HEREBY FURTHER ORDERED that within thirty days of the date of this order, the proposed training program, grievance procedure, and method(s) for publicizing the grievance procedure shall be submitted to the Court and served on plaintiff. Within fifteen days thereafter, plaintiff shall file any response(s) she may have to defendant corporation's proposals.

IT IS HEREBY FURTHER ORDERED that on or before December 28, 1989, plaintiff's counsel shall file a documented request for attorney's fees and expenses, along with a brief (no more than fifteen pages in length) citing argument and authority in support of the request.

IT IS HEREBY FURTHER ORDERED that on or before January 5, 1990, defendants may respond to plaintiff's documentation and brief filed in support of plaintiff's request for fees and expenses.

BAILEY v. RYAN STEVEDORING CO.

U.S. Court of Appeals,
Fifth Circuit (New Orleans)

BAILEY v. RYAN STEVEDORING COMPANY, INC., et al., No. 89-3536, February 14, 1990

CIVIL RIGHTS ACT OF 1964

Counsel fees >108.7391 >108.8848

Federal district court properly refused to relieve longshoreman, whose action resulted in merger of segregated unions but who otherwise obtained no relief, from judgment that had denied him counsel fees on ground that he was not prevailing party, even though U.S. Supreme Court had changed standard for determining prevailing-party status after his case had become final, where denial of fees was not based on court of appeals' decision that Supreme Court overturned, and change in decisional law after entry of judgment does not constitute exceptional circumstances warranting relief from judgment.

Appeal from the U.S. District Court for the Middle District of Louisiana. Affirmed.

See also 7 FEP Cases 914; 12 FEP Cases 1036, 528 F.2d 551; 14 FEP Cases 160, 533 F.2d 976; 14 FEP Cases 303, 429 U.S. 1052; 16 FEP Cases 706, 443 F.Supp. 899; 22 FEP Cases 445, 613 F.2d 588; 25 FEP Cases 112, 450 U.S. 984; 44 FEP Cases 1669, 678 F.Supp. 1347; 44 FEP Cases 1671, 806 F.2d 55; and 44 FEP Cases 1671, 484 U.S. 815.

Johnnie A. Jones (Jones & Jones), Baton Rouge, La., for appellant.

Jerry L. Gardner, Jr. (Gardner, Robein & Healey), Metairie, La., for appellee ILA, Local 3033.

William R. D'Armond and Melanie M. Hartmann (Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman), Baton Rouge, La., for employer appellees.

Before WILLIAMS, HIGGINBOTHAM, and SMITH, Circuit Judges.

Full Text of Opinion

PATRICK E. HIGGINBOTHAM, Circuit Judge: — Appellant, Alton J. Bailey, appeals from the denial of his Motion to Reopen for Reconsideration his motion for attorney's fees, costs, and expenses. Because we find that the district court did not err in denying reconsideration, we affirm.

I

In 1971 Bailey filed his original complaint against five stevedoring companies and two local unions of the ILA, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* The district court dismissed Bailey's lawsuit against all defendants, finding that he failed to prove that any discriminatory employment practices existed. The Court of Appeals affirmed. *Bailey v. Ryan Stevedoring Co., Inc.*, 528 F.2d 551 [12 FEP Cases 1036] (5th Cir. 1976), *rehearing denied*, 533 F.2d 976 [14 FEP Cases 160] (5th Cir. 1976), *cert. denied*, 429 U.S. 1052, 97 S.Ct. 767, 50 L.Ed.2d 769 [14 FEP Cases 303] (1977). This court upheld the district court's ruling dismissing all claims against the stevedoring companies, and the ruling that there had been no discrimination against Bailey. This court did find that there was a danger of future discrimination when segregated unions were maintained, and directed the district court to issue a permanent injunction against the continued operation of segregated local unions. After further litigation, the unions finally merged.

On June 14, 1983, Bailey filed a motion for attorney's fees. With respect to the stevedoring companies, the district court held:

> [T]he stevedoring companies were not liable for attorney's fees since they had nothing to do with the operation of the unions and had no voice in determining whether there should be a merger of the unions. Furthermore, these companies were not guilty of any discrimination against the plaintiff or the union. Thus, these companies cannot be required to pay attorney's fees to the plaintiff whether plaintiff is a prevailing party or not.

On July 10, 1986, the court denied Bailey's entire request for attorney's fees as to all parties, finding that Bailey was not a prevailing party. On December 17, 1986, this court affirmed. 806 F.2d 55 [44 FEP Cases 1671] (5th Cir. 1986). The Supreme Court denied certiorari on October 5, 1987. 484 U.S. 815, 108 S.Ct. 67, 98 L.Ed.2d 31 [44 FEP Cases 1671] (1987).

Following the Supreme Court's decision in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. ——, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), Bailey sought to reopen this case. He based his motion for reconsideration on Rules 60(b)(5) and (6), Fed.R.Civ.P., which provide circumstances in which a party may be relieved from a final judgment. The district court denied Bailey's motion on July 7, 1989, and Bailey appeals.

II

The district court's refusal to allow reconsideration of a final judgment under Rule 60(b) will be reversed only if the district court abused its discretion. *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263, 98 S.Ct. 556, 560, 54 L.Ed.2d 521 (1978).

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Chairman FORD. Thank you, Ms. Morris.

Ms. Ezold.

Ms. EZOLD. Chairman Ford, members of the committee. I am Nancy O'Mara Ezold, a practicing attorney from the Philadelphia area for the past 10 years.

I have been asked to testify because of my successful, precedent-setting litigation against a major Philadelphia law firm for discrimination in violation of Title VII, for denying me partnership. The case was precedent-setting because it was the first such case brought by a woman against a law firm for partnership under Title VII. Although I won a decisive victory on the merits, Title VII will never permit the court to make me whole.

I would like to just very briefly discuss my background, my experience at the law firm, and the financial and career consequences which have resulted. I have been a lawyer for only 10 years, but I have worked my entire life. After graduating from the University of Maine cum laude, I worked for four years for then Senator Edmund S. Muskie here on Capitol Hill.

I moved to Philadelphia and spent the next six years as contract administrator for the Philadelphia Model Cities program, and, for three years after that, I was administrator of the Philadelphia special prosecutor's office.

I had always wanted to go to law school, and, unfortunately, it was beyond my reach for all of those years. But, finally, in 1977, I enrolled at Villanova law school and graduated three years later with my J.D. While I was there, I won the school's year-long moot court competition. I won an award for the national moot court competition. I worked part-time and summers, and I raised my family, which had grown to two children, with the birth of my second child right before my third year of law school.

After leaving Villanova, I began the practice of law with a well-known labor law firm in Philadelphia. After one year there, I was recruited by a small Philadelphia litigation firm where I spent two years handling plaintiffs' employment discrimination cases in Federal court.

In 1983, I interviewed at a large, prestigious Philadelphia law firm, Wolf, Block, Schorr and Solis-Cohen, which was seeking a litigator with some experience and maturity to handle cases, negotiate cases, and try cases without a long learning curve.

The head of the litigation department told me, in part, that he was hiring for my experience and maturity. And he said to me, "It won't be easy for you here at Wolf Block. You didn't go to an Ivy League school. You're not law review, and you're a woman." He was right.

I accepted the challenge because I optimistically believed that when I performed well I would be treated fairly. However, from the beginning, I was treated differently from the male associates, particularly with respect to two very important practices in law firms. First, I was not given the same kinds of complex cases to handle that the male associates were; and, second, I was not assigned to as broad a number of partners as the male associates, both of which ultimately became very important in obtaining partnership votes.

I raised the issue of assignments, even within my first year at Wolf, Block, when I realized what was happening. What happened is set forth in the opinion of the United States District Court for the Eastern District of Pennsylvania, which contains some 151 individual findings of fact, covering 38 pages. I will try to be brief, and I am going to only mention a couple of those.

The court found, with respect to my case assignments, "The Litigation Department," and I am quoting, "primarily assigned the plaintiff to civil actions that were small cases by Wolf, Block's standards and a variety of criminal matters. The plaintiff's lack of opportunity to work with a significant number of partners seriously impaired her opportunity to be fairly evaluated for partnership."

Another finding: "The plaintiff complained about the quality of her assignments in civil case to the litigation department partners, who assign cases to associates. The plaintiff also objected to being assigned to work with only a very limited number of partners. The litigation department chair acknowledged that most of the work opportunities give to the plaintiff were inferior and promised that the problem would be corrected."

The court cited a memorandum to the firm's executive committee, which had been urging my admission to partnership, written by a partner with whom I had worked extensively. He described what he called the "catch 22" of my situation: "The chairman of the litigation department would not assign her to complex cases, yet she received negative evaluations for not working on complex cases."

I would add that the cases I am referring to that I didn't get over all those years were complex civil cases which large law firms take pride in and which they see as their reason for being. I did, however, handle substantial matters with this one partner the last three or four years I was at Wolf, Block, where I spent about 60 percent of my time handling white collar criminal cases and Federal contractor matters involving substantial procedural, legal, constitutional questions.

The court found that I was treated differently from the male associates in other ways. For brevity, I will skip some of them. An example is: The court found that I was "criticized for being 'very demanding' and was expected by some members of the firm to be nonassertive and acquiescent to the predominantly male partnership. Her failure to accept this role was a factor which resulted in her not being promoted to partner. However, several male associates who had been evaluated negatively for lacking sufficient assertiveness in their demeanor were made partners."

The evaluation process for my candidacy for partnership occurred in the fall of 1988. As in all prior years, all partners—at that time there were 105 partners, five of whom were women—all partners were asked to evaluate me along with all of the associates. So by the time I had been there six years, there were 600 evaluations in my personnel file. I had seen not a single one of them, nor had any other associate at Wolf, Block. The policy was to keep them secret.

The evaluations were reviewed. The appropriate recommendations were made up through the committee system at Wolf, Block, and I was not recommended for partnership. During the trial, both sides introduced hundreds of evaluations and comments relating to me and relating to the male associates who were considered for partnership at or about the same time as I.

Some of the court's findings relating to my evaluations were, and I quote, "In the period up to and including 1988, Ms. Ezold received strongly positive evaluations from almost all of the partners for whom she had done any substantial work.

"The litigation department chairman wrote in his 1987 evaluation, 'Nancy is an exceptionally good courtroom lawyer, instills confidence in clients, gets things done, is unafraid, and has all the qualifications for partnership. What I envisioned about her when I hired her was a good, stand-up, effective courtroom lawyer, and that remains to be true, and I think she has proven her case.'

"In 1987, a partner in the corporate department and a member of the executive committee, who had had substantial contact with Ms. Ezold, rated her overall skills and her legal analysis and legal writing abilities between distinguished and good.

"And that same partner wrote, in his June 1988 evaluation, 'I think she handles herself well in both formal and informal settings. She craves and reaches out for more responsibility, has shown industriousness, dedication, good judgment, and client skills in several matters. I get the sense she should have the opportunity for greater independent responsibility.' "

I could go on. Let me just add one last evaluation because it is from the new chairman of the litigation department, who assigned me, finally, to a complex securities case just a year before I was up for partnership. "Last year, I assigned Nancy to assist me in a securities case and a related SEC investigation. Complex civil litigation was new to her. Opponents respect her. The client's officers and directors are crazy about her and have said so.

"Nancy is another one of those people who is here weekends and nights. She has difficult family responsibilities, but she never complains about workload and is always available. She is one of two or three people who will march into court and handle a preliminary injunction on an hour's notice.

"This case was the first really fair test for Nancy. I believe that her background relegated her to matters where she got virtually no testing by Wolf, Block's standards and small matters. She is much, much better than that. Moreover, she can try cases because of her guts and maturity. That is not true of all of our litigators."

With respect to my male counterparts, the court found, and I quote, "Male associates, who received evaluations no better than the plaintiff and sometimes less favorable than the plaintiff, were made partners." This conclusion was supported in the opinion by some 42 findings of fact relating to partners' evaluations of the male candidates for partnership.

There were boxes of them. Let me quote just a few. "Seems bright, but he is a bit of a con man." "Not as smart as he seems or thinks he is." "He's just too slick to instill that degree of comfort." "I think he's very lazy, and, when an assignment or case does not interest him, he only gives the matter minimal attention."

"I don't know how he has lasted this long in the firm." "His writing is dense and mediocre." "His intellectual laziness will someday embarrass us," and so it has. "A lack of professionalism, both in terms of legal analysis and research." "He appears to avoid responsibility." I could go on and on. All of the male associates about whom those comments were made became partners.

The court stated, in two succinct findings, the difference in the standard applied to me compared to the males. The first was, "The test that was put to the plaintiff by the associates committee that she have outstanding academic credentials and that before she could be admitted to the most junior of partnerships, she must demonstrate that she had the analytical ability to handle the most complex litigation was not the test required of male associates."

And the second, "Requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext."

The chairman of the executive committee called me to his office and told me that the executive committee was not going to recommend me for partnership. That was the death knell, because, without that recommendation, your name didn't even go to the full partnership for a vote.

However, he told me that an interesting opportunity had presented itself a few days earlier, when the head of the domestic relations section and one of two attorneys assisting him resigned. He then offered me partnership on two conditions: first, that I abandon the eight years of civil litigation and white collar criminal law that I had been practicing; and, second, that I wait one year for partnership. He also told me, as an aside, that I could learn domestic relations law "in a week."

I declined the offer because it would have required me to abandon my eight year litigation practice and start all over again in a new field in which I had no track record or client base and in which I was not interested and, also, which the firm made it clear it did not respect. No male associate at Wolf, Block was required to give up an eight-year investment of time in his specialty, start over in a new field, and also wait a year to become partner.

I was also told that, although I lacked sufficient votes for partnership, many partners at the firm were very pleased with my work and I was welcome to stay as an associate, continuing the practice I had been doing all those years at a fraction of partnership compensation. That, members of the committee, was my glass ceiling.

I was welcome to stay as an associate and continue the work I had been doing well, continue to please clients, and continue to make money for the firm, or, alternatively, become a partner, at the cost of abandoning my areas of expertise, adopting a practice which the firm accorded a lower status, and accept a one-year delay in partnership.

The trial court's finding on the offer of partnership was as follows: "Before Ms. Ezold could be admitted to partnership, she would have to serve an additional year as an associate. The additional year was not for purposes of giving any additional training or experience. Accordingly, the chairman of the executive committee was satisfied that in 1988 the plaintiff had all the requisites to be a member of the firm at that time."

I began to look for a position at other firms, and my job search then and later made it clear to me that I would never find partnership at another large firm with similar compensation and career opportunity. A corporate client, an environmental remediation firm, offered me the position of president and chief counsel. I took that position with a one-year contract, worked out the contract, and decided to go back to the practice of law, which I am present doing with a very small law firm, Rosenthal and Ganister, in West Chester, Pennsylvania.

I filed suit in January 1990, and the case was tried for 13 days in August and September. It was a grueling month spent listening to partner after partner testify to alleged deficiencies in my handling of cases, despite a voluminous record of a very favorable partner evaluations, despite numerous client accolades, despite favorable results on most of the cases in which I was involved, and despite the fact that many of these criticisms were being voiced for the first time.

The experience was tolerable for me—tolerable, not enjoyable—because I expected it and because I had confidence in my legal abilities and in the merits of my case. But I can assure you I would not counsel another to undergo it lightly.

The trial resulted in a judgment on Title VII for me. The court denied my constructive discharge claim. Briefs were filed, on February 1 of this year, on remedies, and the court has not yet determined what relief will be granted. Under any circumstances, Wolf, Block has promised it will appeal the District Court's finding in my favor. The remedies available under Title VII do not permit the court to make me whole.

There is a reason why this is a precedent-setting case. A question was raised about attorneys running to file suits if the remedies are expanded under Title VII. I am an attorney. I have handled these kinds of cases for plaintiffs. But I am the first attorney even to sue other attorneys for this kind of wrong. The reason is the difficulty in bringing the case, the extreme difficulty in the burden of proof, and what happens to you when you do bring such a case.

Any woman who takes it upon herself to bring such a case is certain to know that she will suffer harm that cannot be compensated under Title VII. That lack of make-whole relief infects the decision-making process in deciding whether to bring a case to begin with.

She has to know that the defense is going to involve an all-out public attack on her education, training, work experience, job performance, and those subjective qualities that so often find their way into the defense of Title VII cases: management ability, personality traits, and intellectual ability.

Not only must she endure public embarrassment but also permanent damage that the attacks cause on her career. Even after the court in my case found that gender was a determining factor in the failure of the firm to promote me to partnership, Wolf, Block continued to tell the public on television and in the press that I was, "denied partnership because I failed to meet Wolf, Block's standards."

Employers are well aware of the limits of their liability when they are found to have violated a female employee's rights. Wolf, Block's attorney was quoted in the press as stating that mine was a "symbolic victory" and that he did not think I would be granted much relief.

When you contrast the employer's limited monetary risk with the permanent career damage risked by a woman, is it any wonder women do not assert their rights?

In closing, members of the committee, I grasped the opportunities presented to me when I went to Wolf, Block eight years ago, and I threw myself into them with skill, with enthusiasm, with dedication, and hard work. Nothing would have been good enough.

I invested the early years, the critical early years, of my professional life at Wolf, Block for the same reason that male associates do: for the opportunity for the large-firm legal practice, for the compensation, and for the prestige and perquisites that such partnership brings. All I asked was the same, fair chance given to men.

These opportunities were snatched from me at a time in my life when I should be enjoying them, when my financial obligations are greatest, as I am putting my older son through college and looking forward to my younger son to follow.

Equitable remedies of Title VII, reinstatement and back pay, compensate for one kind of loss, but they cannot compensate for the emotional damage and the career damage to one's life's work. They are also not enough of a deterrent. They are just a cost of doing business.

Thank you.

[The prepared statement of Nancy O'Mara Ezold follows:]

STATEMENT OF NANCY O'MARA EZOLD
BEFORE THE EDUCATION AND LABOR COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING H.R.1, THE CIVIL RIGHTS ACT OF 1991

FEBRUARY 27, 1991, ROOM 2175
RAYBURN HOUSE OFFICE BUILDING

CHAIRMAN FORD, MEMBERS OF THE COMMITTEE:

I am Nancy O'Mara Ezold, a practicing attorney in the Philadelphia area for the past ten years. I have been asked to testify because of my successful, precedent-setting litigation against a major Philadelphia law firm which the Court found discriminated against me on the basis of sex in denying me partnership in violation of Title VII. The case was precedent-setting because it was the first such case which went to trial. Although I won a decisive victory on the merits, the remedies available under Title VII will never permit me to be made whole.

I would like to tell you briefly about my background, my experiences which led to the lawsuit, and the career and financial consequences which have resulted. My situation, which is typical of both the glass ceiling encounters experienced by women in many professions, and the inability to secure full and fair relief, represents only the tip of the iceberg.

At 48 years old I have been a lawyer for only ten years, but I have worked my entire life. I worked during high school and during my 4 years at the University of Maine to help pay tuition. After graduating cum laude, I accepted a position with then Senator Edmund S. Muskie for whom I had served as an intern having won a Congressional internship competition at Maine. I was an Assistant to the Senator for 4 years. I then moved to Philadelphia where I was Contract Administrator for the Philadelphia Model Cities Program for six years, and following that, Administrator of the Philadelphia Special Prosecutor's Office for 3 years.

In all of those positions I worked with attorneys which reinforced a lifelong desire to become a lawyer. For many reasons law school had previously been out of my reach. Neither of my parents had gone to college, but their unusual foresight and substantial personal sacrifices made it possible for their children to receive a college education. In 1977, I enrolled at Villanova Law School and three years later received my J.D. I graduated in the top third of my class while also winning the school's moot court competition, winning an award in a national moot court competition, working summers and part-time, and raising my two children, the second born just before my third year of law school.

In 1980, I began the practice of law with a well known Philadelphia labor law firm. After one year I was recruited by a small firm with a federal litigation practice, and I stayed there two years handling plaintiff's federal employment discrimination cases.

In 1983, I interviewed at a large Philadelphia firm, Wolf, Block Schorr & Solis-Cohen, which was seeking a litigator with some experience who could handle, negotiate and try cases without a long learning curve. The head of the Litigation Department hired me in part, he said, for my experience and maturity. However, he told me it would not be easy for me at Wolf Block, because I did not fit the mold since I was not Ivy League or law review, and because I was a woman. He was right.

I accepted the challenge and optimistically believed that when I performed well I would be treated fairly. However, from the beginning I was treated differently than the male associates particularly with respect to two practices which ultimately were very important to securing partnership votes; I was assigned smaller, less complex cases, and I was not assigned to work with as wide a variety of partners as the male associates. I raised the issue of assignments within my first year at Wolf, Block, and was told over the years that an effort would be made to improve them. What happened is set forth in the opinion of the trial court, the United

States District Court for the Eastern District of Pennsylvania, which contains 151 individual findings of fact, covering 38 pages. The Court found with respect to case assignments:

> [The Litigation Department] primarily assigned the plaintiff to civil actions that were small cases by Wolf, Block standards, and a variety of criminal matters.
>
> The plaintiff's lack of opportunity to work with a significant number of partners seriously impaired her opportunity to be fairly evaluated for partnership.
>
> The plaintiff complained about the quality of her assignments in civil matters to the Litigation Department partners who assigned cases to associates. The plaintiff also objected to being assigned to work with only a very limited number of partners. [The Litigation Department Chair] acknowledged that most of the work opportunities given to the plaintiff were inferior and promised that the problem would be corrected.
>
> Ms. Ezold did not work for more than 500 hours on any one matter in any year according to the defendant's computer-maintained time records. In contrast, virtually all the male associates in the department worked on major matters for which they logged at least 600 hours per year.
>
> During [a Litigation Department assignment] meeting, [a partner] asked for a volunteer to work on a preliminary injunction. Although Ms. Ezold was the only associate to volunteer, and was initially assigned the case, within an hour [the partner] without explanation, had reassigned it to a male associate.

The Court cited a memorandum to the firm's executive committee urging my admission to partnership written by a partner who had worked extensively with me and described the "catch 22" of my situation:

> The Chairman of the Litigation Department would not assign her to complex cases, yet she received negative evaluations for not working on complex cases.

When the case was tried, I also heard criticism that I was not a team player. The Court found:

> The only basis of this criticism...was the plaintiff's perceived concern about women's issues such as the Firm's treatment of paralegals, who

> were virtually all female and the Firm's treatment of part-time attorneys who were all female.

I had questioned why the paralegals were not paid for overtime work on nights and weekends when the firm billed the clients for that overtime. The Court found that when a male attorney at Wolf Block discussed the issue of part-time attorneys his partner believed he was not "using bad judgment in raising that question as a women's issue," but, said the Court, "Ms. Ezold's characterization of matters affecting largely female groups as 'women's issues' was evaluated differently."

The Court further found that I was:

> Criticized for being "very demanding" and was expected by some members of the Firm to be non-assertive and acquiescent to the predominantly male partnership. Her failure to accept this role was a factor which resulted in her not being promoted to partner. However, several male associates who had been evaluated negatively for lacking sufficient assertiveness in their demeanor were made partners.

The evaluation process for my candidacy for partnership occurred in the fall of 1988. As in all prior years, each partner completed an evaluation form for each associate. By 1988 there were approximately 105 partners of whom only 5 were women. My personnel file contained about 600 evaluations. I had never seen my personnel file until I asked for it after resigning and I do not believe any other associate had ever seen his or hers. The firm had a policy of keeping the evaluations secret.

The evaluations were reviewed by the Associates Committee, comprised of 10 partners, and a "bottom line memo" was prepared by a Committee member. For those associates who were candidates for partnership, the Associates Committee made a recommendation to the 5 member Executive Committee, and the Executive Committee had sole and ultimate responsibility for determining who was elected to the partnership since the firm's voting partners could consider only those recommended by the Executive Committee. I was not recommended for partnership by either committee.

During the trial both sides introduced hundreds of evaluations and comments relating to me and to other associates considered for partnership during or close to my year. The Court made several findings relating to them. Some of the findings relating to my evaluations were as follows:

> In the period up to and including 1988, Ms. Ezold received strongly positive evaluations from almost all of the partners for whom she had done any substantial work.
>
> Ms. Ezold's overall score in legal skills in the 1988 bottom line memorandum...was a "G" for good". (where the top 2 categories were "distinguished" and "good.").
>
> [The Litigation Department Chairman] wrote in his 1987 evaluation:
>
>> Nancy is an exceptionally good courtroom lawyer, instills confidence in clients, get things done, is unafraid and has all the qualifications for partnership...What I envisioned about her when I hired her was a "good stand-up, effective courtroom lawyer" remains to be true and I think she has proven her case...
>
> In 1987,... a partner in the Corporate Department and a member of the Executive Committee who had had substantial contact with Ms. Ezold, rated her overall skills and her legal analysis and legal writing abilities between "distinguished" and "good."
>
> [That same partner] wrote in his June 1988 evaluation of Ms. Ezold:
>
>> I think she handles herself well in both formal and informal settings...She craves and reaches out for more responsibility...Has shown industriousness, dedication, good judgment and client skills in several matters. I get the sense she should have [the] opportunity for greater independent responsibility.

The Court found that another partner with whom I had worked closely for several years rated me "Distinguished" in all personal qualities in 1988, and described me as "a top flight associate" who "will make a fine partner."

The new chairman of the Litigation Department who assigned me to a complex securities case in 1987, wrote in his final evaluation:

> Last year I assigned Nancy to assist me in ... [a securities case] and a related SEC investigation. Complex civil litigation was new to her... Opponents respect her. The [client's] officers and Directors are crazy about her, and have said so. Nancy is another one of those people who is here weekends and nights -- she has difficult family responsibilities. She never complains about workload and is always available. She is one of two or three people who will march into court and handle a preliminary injunction on an hour's notice. [This case] was the first really fair test for Nancy. I believe that her background relegated her to...matters (where she got virtually no testing by Wolf, Block standards) and small matters. She is much, much better than that. I could handle any case with Nancy and she will soon be able to handle major cases independently -- she can do so now, in my opinion, in consultation with an experienced partner. Moreover, she can try cases because of her guts and maturity. That is not true of all of our litigators.

The Court further found that:

> The test that was put to the plaintiff by the Associates Committee that she have outstanding academic credentials and that before she could be admitted to the most junior of partnerships, she must demonstrate that she had the analytical ability to handle the most complex litigation, was not the test required of male associates.

Finally, the Court concluded:

> Requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext.

With respect to my male counterparts, the Court found that "Male associates who received evaluations no better than the plaintiff and sometimes less favorable than the plaintiff were made partners." This conclusion was supported in the opinion by some 42 findings of fact relating to partners' evaluations of the job performance of male associates who were made partners. I will not belabor them, but a representative sample of the evaluation excerpts contained in the Court's findings includes the following:

> Seems bright, but he is a bit of a con man. Not as smart as he seems or thinks he is.
>
> He's just too slick to instill...that degree of comfort.
>
> I think he is very lazy and when an assignment or case does not interest him, he only gives the matter minimal attention.
>
> I don't know how he has lasted this long in the firm.
>
> His writing is dense and mediocre.
>
> His intellectual laziness will same day embarrass us.
>
> A lack of professionalism, both in terms of legal analysis and research.
>
> He appears to work to avoid responsibility.
>
> Not particularly able in client servicing and development.
>
> Less than tactful.
>
> Offended terribly my father-in-law...who changed firms as a result....
>
> Abandoned ship...failed to follow up.
>
> Sloppy at times and [showed] occasional lapses in judgment.
>
> Phlegmatic, diffident, non-assertive and unimaginative.

All of the male associates about whom these evaluation comments were made became partners.

The Associates Committee recommended to the Executive Committee that I not be made a partner. Subsequently, the Chairman of the Executive Committee called me to his office and told me that the Executive Committee was not going to recommend me for partnership. However, he said an interesting opportunity presented itself a few days earlier when the head of the domestic relations section and one of two attorneys assisting him resigned. He then offered me partnership on the conditions that (1) I wait one year and (2) I take over the firm's family law practice which I "could learn in a week." I declined the offer. It would have required me to abandon 8 years of practice in white collar criminal and commercial civil litigation to start over again in a new field in which I had no track record or client base, in which I was not interested and which the firm did not respect. No male associate was required to give up an 8 year investment of his time in his specialty, start over in a new field, and also wait a year, to become partner. I was also told that although I lacked sufficient votes for partnership, many partners at the firm were very pleased with my work and so the firm also offered me the opportunity to remain, as an associate, continuing my litigation practice at a fraction of partnership compensation.

This was my glass ceiling. I was welcome to stay as an associate and continue the work I had been doing well, continue to please clients and continue to make money for the firm, or alternatively become a partner at the cost of abandoning my areas of expertise, adopting a practice which the firm accorded a lower status, and accepting a one year delay in partnership, none of which was required of my male counterparts.

The Trial Court's finding on this conditional offer of partnership was as follows:

> Before Ms. Ezold could be admitted to partnership, she would have to serve an additional year as an associate. The additional year was not for purposes of giving any additional training or experience. Accordingly, the Chairman of the Executive Committee was satisfied that in 1988 the plaintiff had all the requisites to be a member of the Firm at that time.

I began to look for a position at other firms, and my job search then and later made it clear that partnership at another large firm with similar compensation and career opportunity was highly unlikely. A corporate client, an environmental remediation firm, offered me the position of president and chief counsel, and I accepted. We agreed to a one year contract and by the end of that year I decided to return to the practice of law. I have been Of Counsel to Rosenthal and Ganister, a 5 attorney litigation firm in West Chester, Pennsylvania, since June of last year.

I filed suit in January 1990, and the case was tried for 13 days in August and September. It was a gruelling month spent listening to partner after partner testify to alleged deficiencies in my handling of cases despite a voluminous written record of very favorable partner evaluations, despite numerous accolades from clients, despite favorable results on the cases in which I was involved, and despite the fact that many of these criticisms were being voiced for the first time. The experience was tolerable because I expected it and because I had self-confidence in my legal abilities and in the merits of my case, but I would not counsel another to undergo it lightly. The trial resulted in a judgment for me on the Title VII claim. The Court denied my constructive discharge claim. Briefs were filed on February 1st on remedies issues, and the Court has not yet determined what relief will be granted. Wolf Block has promised it will appeal the District Court's finding in my favor.

The remedies available under Title VII do not permit the Court to make me whole for the losses I have suffered. There is a reason why this is a precedent-setting case. Women, even women in the professions, are reluctant to take the enormous risks inherent in trying to prove discrimination, no matter how egregious, when to do so is certain to cause further damage to reputation and career which cannot be compensated until Title VII. That lack of make-whole relief infects the decision-making process because a woman who asserts her statutory rights knows that the defense will most likely involve an all-out public attack on her education, training, work experience, job performance and those subjective qualities so often found in the defense of discrimination cases such as management ability, personality traits, and intellectual ability. Not only must she endure public embarrassment, but also the permanent damage such attacks cause on her career. Even after the Court in my case found that "gender was a determining factor in the failure of the Firm to promote the plaintiff to partnership in 1989," Wolf Block continued to tell the public on television and in the press that I was denied partnership because my abilities were not up to the firm's standards.

Employers are well aware of the limits of their liability when they are found to have violated a female employee's civil rights. Wolf Block's attorney was quoted in the press as stating that mine was a "symbolic victory" and that he did not think I would be granted much relief. When you contrast the employer's limited monetary risk with the permanent career damage risked by a woman, is it no wonder women do not assert their rights.

I grasped the opportunities presented to me when I was hired by Wolf, Block 8 years ago, and threw myself into them with skill, enthusiasm, enormous dedication and hard work. Nothing would have been good enough. I invested the critical early years of my professional life at Wolf Block for the same reasons the male associates did; for the compensation, the opportunity for a large-firm legal practice, and the prestige and perquisites that such partnership brings. All I asked was the same fair chance given to men. Those opportunities were snatched from me at a time in my career when I should by enjoying them and when my financial obligations are greatest as I am putting my older son through college and planning for my younger son to follow. The equitable remedies of Title VII, reinstatement and front and back pay, compensate for one kind of loss, but they cannot compensate for the emotional and career damage to one's life's work. They are also not enough of a deterrent - just a cost of doing business.

Thank you.

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(Cite as: 1990 WL 186924 (E.D.Pa.))

Nancy O'Mara EZOLD,
v.
WOLF, BLOCK, SCHORR AND SOLIS-COHEN.
Civ. A. No. 90-0002.
United States District Court, E.D. Pennsylvania.
Nov. 29, 1990.

Daniel M. Jaffe, Philadelphia, Pa., Judith P. Vladeck, Debra L. Raskin, Michael B. Ranis, Vladeck, Waldman, Elias & Engelhard, P.C., New York City, for Nancy O'Mara Ezold.

Mark S. Dichter, Ian A.L. Strogatz, M. Norman Goldberger, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for Wolf, Block, Schorr and Solis-Cohen.

AMENDED MEMORANDUM

JAMES McGIRR KELLY, District Judge.

*1 The court has now considered the testimony that has been presented in this case and is prepared to make its Findings of Fact and Conclusions of Law and decision.

FINDINGS OF FACT

1. Plaintiff Nancy Ezold has alleged that Wolf, Block, Schorr and Solis-Cohen ("Wolf, Block" or "the Firm") discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s 2000e, et seq., when it [redacted] Ms. Ezold also alleged that she was [redacted] y Wolf, Block on account of her sex by reason of the adverse partnership decision. In addition, Ms. Ezold alleged a claim under the Equal Pay Act, 29 U.S.C. s 206(d), of the Fair Labor Standards Act, 29 U.S.C. s 201, et seq. The Court has jurisdiction over this action pursuant to 42 U.S.C. s 2000e-5(f)(3).

2. Prior to trial, with the agreement of the parties, the Court bifurcated the issues of liability and damages.

3. In addition, the Court severed Ms. Ezold's claim under the Equal Pay Act pursuant to Fed.R.Civ.P. 42(b).

4. Ms. Ezold graduated from Villanova Law School in 1980. She graduated 61st out of a class of 194, and was not a member of the Villanova Law Review.

5. Subsequent to her graduation from law school, Ms. Ezold worked at the Law Firm of Kirschner, Walters & Willig from 1980 to 1981. She was involved primarily in the representation of union members through their union legal services plan in personal matters such as workers' compensation, domestic relations and real estate settlements.

6. From 1981 to July, 1983, Ms. Ezold worked at the law firm of Phillips and Phelan. This firm had two attorneys besides the plaintiff.

7. The defendant firm [illegible]

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hired her. There were no objections by anyone on the defendant Firm's hiring Committee to the plaintiff's hiring or placing her on a partnership track.

9. Wolf, Block is a law firm based in Philadelphia which, as of 1989, was comprised of 249 attorneys, approximately one-half of whom were partners. Wolf, Block has a number of departments, including real estate, corporate, litigation, taxation, estates and labor. During the time Ms. Ezold worked at Wolf, Block, the Litigation Department grew from 36 to 55 attorneys.

10. Wolf, Block is governed by a 5-member Executive Committee which is responsible for establishing policy for the Firm and for operating the Firm on a day-to-day basis. The Executive Committee's members are elected by the Firm's voting partners.

*2 11. Wolf, Block has a 10-member Associates Committee which includes partners from each of the Firm's departments. The members of the Associates Committee are appointed by the Executive Committee.

12. The Associates Committee is responsible for, inter alia, reviewing the

performance and evaluations of all of the Firm's associates and making recommendations to the Firm's Executive Committee as to salary and as to which associates should be admitted to the partnership.

13. The Executive Committee reviews the partnership recommendations of the Associates Committee and, in turn, exercises its own discretion in making partnership recommendations to the entire partnership. Only those persons who have been recommended for partnership by the Executive Committee are considered for admission to the partnership by the Firm's voting partners, upon whom rests the sole and ultimate responsibility for determining who is elected to the partnership.

14. The defendant Firm hires many associates immediately after their graduation from law school or completion of a judicial clerkship (referred to as "non-laterals"). Non-laterals are considered for partnership approximately 7 1/2 years after their graduation from law school. Other associates, referred to as "laterals," are hired after they have had experience working at other law firms or in other post-law school employment, and are generally subject to a five-year rule for partnership consideration.

15. Until 1989, certain associates of an experience level to be admitted to a partnership were accorded **"special partner" status**. Such individuals, in contrast to other partners (referred to as "regular" partners), do not have the right to vote or to receive any equity share in the partnership, are subject to

removal by the Executive Committee, and have benefits which are inferior to those provided to regular partners.

16. In the **Spring of 1983**, Ms. Ezold applied for employment at Wolf, Block. She met initially with Seymour Kurland, who was then the Chairman of the Litigation Department.

17. From 1983 until 1987, Mr. Kurland was the chair of the Litigation Department. Thereafter Alan Davis served as chair of the Litigation Department.

18. In **1983, Ms. Ezold was offered a position as an associate** in Wolf, Block's Litigation Department. During the selection process, she had meetings and telephone conversations with Mr. Kurland, who said that her prior work experience helped make her an attractive candidate to do litigation for Wolf, Block. **Mr. Kurland told Ms. Ezold that it would not be easy for her at Wolf, Block because she did not fit the Wolf, Block mold since she was a woman, had not attended an Ivy League law school, and had not been on law review.** Mr.

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Block's offer of employment, Ms. Ezold had lunch with Roberta Liebenberg and Barry Schwartz, who were both members of the Litigation Department. Ms. Ezold admitted she did not mention to them the statement by Mr. Kurland that she

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would have a difficult time at Wolf, Block because she is a woman, did not ask them any questions about the treatment of women at Wolf, Block, and did not express to them any concern over the Firm's treatment of women.

*3 20. Ms. Ezold began working at Wolf, Block in July, 1983 and was assigned to the Firm's Litigation Department.

21. From 1983 until 1987 Mr. Kurland was responsible for assignment of work to associates in the Litigation Department, a duty he delegated in part to partner Steven Arbittier. Thereafter Mr. Davis assumed primary responsibility for distribution of work to associates in the Department.

22. Ms. Ezold handled various matters for the defendant during her tenure at Wolf, Block. She worked for partners in the Litigation Department on criminal matters, insurance cases, general commercial litigation and other areas, and also did work for some partners in other departments. She handled matters at all stages of litigation, and was called upon by partners to go to court on an emergency basis.

23. Ms. Ezold routinely researched and drafted briefs and pleadings on the matters on which she worked, and during the last two years of her employment at Wolf, Block, supervised junior associates in their preparation of briefs and pleadings.

24. Mr. Arbittier primarily assigned the plaintiff to civil actions that were small cases by Wolf, Block standards, and a variety of criminal matters.

25. For example, in 1983, Mr. Arbittier assigned the plaintiff, together with an associate, Mr. McCullough, responsibility for a large group of minor cases previously handled by Steve Levin, an associate who had worked on such matters and had left the Firm.

26. Thereafter, the plaintiff was given responsibility for ten to fifteen bankruptcy matters involving collections of $400 or less.

27. Ms. Ezold did not work for more than 500 hours on any one matter in any year according to the defendant's computer-maintained time records. In contrast, virtually all the male associates in the department worked on major matters for which they logged at least 600 hours per year.

28. The plaintiff attended regular assignment meetings in the Litigation Department where she had the opportunity to observe the assignments being given to male associates. She learned at such meetings of the informal procedure by which partners spoke directly to certain associates to assign them responsibilities bypassing the formal assignment procedure.

29. During one such meeting, Mr. Arbittier asked for a volunteer to work on a preliminary injunction. Although Ms. Ezold was the only associate to volunteer, and was initially assigned the case, within an hour Mr. Arbittier, without explanation, had reassigned it to a male associate.

30. The plaintiff complained about the quality of her assignments in civil matters to the Litigation Department partners who assigned cases to

associates. The plaintiff also objected to being assigned to work with only a

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31. Part of the negative impression concerning the plaintiff's performance was an impression that she was "not a team player," "institutionally disloyal," and that she "bad mouthed" the Firm to young associates. The only basis of this criticism advanced by the defendant Firm was the plaintiff's perceived concern about women's issues, such as the Firm's treatment of paralegals, who were virtually all female and the Firm's treatment of part time attorneys who were all female.

32. The defendant claimed that the plaintiff [illegible] the intellectual [illegible] required for partnership at the Firm. In a memorandum regarding the plaintiff dated June 19, 1984, Robert Boote, a Litigation Department partner, wrote on behalf of the Associates Committee:

> The doubts about whether someone has a depth of intellectual ability [are] a classic concern here, which sometimes turns out to be self-perpetuating and fulfilling. Nancy is a confident lawyer who is doing well at her level. She should be given every opportunity to display her intellectual ability.

33. In a 1988 memorandum to the Executive Committee urging Ms. Ezold's admission to partnership, [illegible]ity, a Litigation Department partner who had worked extensively with her, described the "Catch 22" of the perception that Ms. Ezold could not handle complex cases. He [illegible]:

> [T]he perception that she is not able to grasp complex issues or handle complex cases ... appears to be a product of how Sy Kurland viewed Nancy's role when she was initially hired. For the first few years [illegible] would only assign [illegible] evaluation time, Sy, and some other [illegible] their evaluations by saying that Nancy does not work on [illegible] matters. [illegible] literally trapped in a Catch 22. [illegible] Chairman of [illegible] Department would not assign her to complex cases, yet she [illegible] negative evaluations for [illegible] cases.

34. In a memorandum after his meeting on behalf of the Associates Committee with the plaintiff concerning her evaluation, Mr. Boote wrote in March 1985:

> [Kurland] told her that he was going to see to it that the nature of her assignments was changed so that she would have the opportunity to work with various partners in the Department and so that they would have the opportunity to evaluate her.
>
> * * *
>
> We told her that we did not view it as her fault that she hadn't had the opportunity to demonstrate these [technical] abilities yet, since her work was in large measure a product of the assignments she got.

35. During that meeting, Mr. Boote and [illegible] made a commitment to the [illegible] that she would be assigned an appropriate mix of cases, reporting to [illegible] group of partners. Ms. Ezold was told that she could not be properly evaluated because she had not had the opportunity to show her skills.

36. Mr. Kurland told Ms. Ezold to let him know if partners tried to assign smaller matters to her directly. Nevertheless, although he was head of the department, Mr. Kurland never assigned her to work on a matter for which he was responsible, except for one case in which Wolf, Block's participation as one of five firms representing plaintiffs was minimal, and on even that case she had virtually no contact with Mr. Kurland.

37. In a February 1986 memorandum, Mr. Boote noted that Ms. Ezold was handling a number of small matters for Mitchell Fanzer. Mr. Boote and Mr. Kurland

make the effort to try to give her the assignments that will enable her to attempt to build a place for herself."

*5 38. Many partners bypassed both Mr. Kurland and Mr. Arbittier in selecting associates to work on their cases. Mr. Kurland, in permitting this activity to happen, prevented the plaintiff from securing improved assignments.

39. The plaintiff worked with a limited number of partners in and out of the Litigation Department.

40. The plaintiff's lack of opportunity to work with a significant number of partners seriously impaired her opportunity to be fairly evaluated for partnership. As Charles Kopp wrote in late 1985 to Ian Strogatz:

> I have filled out the [evaluation] forms as requested. I have had virtually no contact with any of the senior associates listed. Accordingly, it is difficult to give an opinion as to whether I would feel comfortable in turning over a significant matter for one of my clients or whether I would be in favor of admitting the associate to the firm. When faced with no information, I must answer "No" to questions like admission to partnership.

41. In Ms. Ezold's 1986 evaluation meeting, Mr. Kurland and Mr. Boote suggested that working in a specialty area would enhance her possibilities for partnership. The partners described continuing and developing her work in white collar crime as a good niche, but one that should not preclude her from taking on general civil work.

42. In his April 1986 evaluation of Ms. Ezold, Mr. Boote wrote: "Nancy is good. Very good. Doing certain kinds of work. Let's try to let her make a place for herself."

43. Mr. Kurland also stated that he felt that Ms. Ezold could specialize in "trial work" and be valuable to the Firm. If Ms. Ezold specialized in "trial work" and if she became "very valuable to the firm, because it was an area where we really needed somebody and she excelled at that, then that would be a

way that she could still perhaps be a partner in the trial department."

44. The plaintiff handled many white collar criminal matters under the supervision of Mr. Magarity, who headed the Firm's white collar crime group.

45. In March 1987, Mr. Magarity wrote a memorandum thanking Mr. Kurland and Mr. Arbittier for permitting Ms. Ezold to work on his matters. In a 1988 memorandum to the Executive Committee in which he urged Ms. Ezold's admission to partnership, Mr. Magarity wrote:

> Virtually every other criminal defendant these days is a corporation. Nancy has shown considerable ability to handle these type[s] of important complex cases. The demand for capable litigators with Nancy's skills in this area is abundant but the supply is sparse. I would be more than willing to have Nancy, as a partner, work full time in this expanding and lucrative area.

(emphasis added).

46. Each year at Wolf, Block all partners submit written evaluations of all associates. The evaluations are to be completed regardless of the extent of the partner's familiarity with the associate's work.

47. The evaluation forms are explicit in describing information which is sought about the associate. Ten characteristics of legal performance are listed: legal analysis, legal writing and drafting, research skills, formal speech, informal speech, judgment, creativity, negotiating and advocacy, promptness, and efficiency. Ten personal characteristics are also listed

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reliability, taking and managing responsibility, flexibility, growth potential, attitude, client relationship, client servicing and development, ability under pressure, ability to work independently, and dedication.

*6 48. The evaluation forms in use for the years 1987 and 1988 describe for the evaluator what each grade means. The grades are described as follows:

Distinguished -- Outstanding, exceptional; consistently demonstrates extraordinary adeptness and quality; star.

Good -- Displays particular merit on a consistent basis; effective work product and performance; able, talented.

Acceptable -- Satisfactory; adequate; displays neither particular merit nor any serious defects or omissions; dependable.

Marginal -- Inconsistent work product and performance; sometimes below the level of what you expect from Associates who are acceptable at this level.

Unacceptable -- Fails to meet minimum standard of quality expected by you of an Associate at this level; frequently below the level of what you expect.

49. The instructions on the form direct the evaluator to describe the partner's experience with the associate in the evaluation period. The

instructions read as follows:

In order to obtain a full evaluation of this Associate, you are urged to observe the following principles: Ratings should be applied on the basis of what you expect of an Associate at this Associate's level of experience. Each item should be answered by selecting the appropriate objective answer with some brief comment, or "NO." (Not Observed). "NO." should be reserved only for those cases where not even a slight observation has been made, as there may be small observations by more than one evaluator which will cumulatively indicate a subtle talent, potential or problem that should be brought out to help the Associate in his/her development. Most valuable to us are your written comments. Attach an additional sheet if necessary, to express yourself completely.

(emphasis in original; bold type supplied).

50. Mr. Strogatz described the process by which associates are evaluated for partnership. Senior associates are lateral associates who have completed their second or third years of employment, or non-lateral hires who have completed five years of employment. Senior associates are typically reviewed once a year. Generally, non-senior associates are evaluated twice a year, although that varies somewhat from year to year.

51. The evaluations reflect letter or number grades of an associate's performance in the listed legal and personal skills. Partners are also asked

to indicate how they would regard the admission of each senior associate to partnership. The five possible answers for that question are: "with enthusiasm," "with favor," "with mixed emotions," "with negative feeling," or "no opinion."

52. The completed evaluation forms are sent to Eileen McMahon, an administrative employee. Ms. McMahon and her staff collect this information

summarized, the summaries are put in books that are sent to members of the Associates Committee so that each person on the committee gets the information that has been collated and summarized.

*7 53. **[illegible] member of the Associates Committee** is assigned the responsibility of reading the original evaluation forms in addition to the summaries for certain associates. That committee member drafts a memorandum concerning each of those associates assigned to him or her for this purpose. The memorandum is distributed to the other members of the Associates Committee, usually the day before the meeting of the committee. This memorandum is called the **"[illegible] line memo."** The bottom line memo

> ... **is intended to be [the Associates Committee member's] own personal view of what he has gleaned from the evaluations submitted at the time by the partners**

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> **who submitted evaluation forms, plus anything in addition that [the Associates Committee member] has gleaned from any interviews that he has conducted with respect to those** evaluations.

(emphasis added).

54. The bottom line memo becomes part of the package that each Associates Committee member has before him or her at the Associates Committee meeting.

55. In the years 1987, 1988, and 1989, the bottom line memos contained a "grid," reflecting the Associates Committee member's summary of that associate's letter grades in legal and personal skills for the preceding evaluation period.

56. Committee members do not receive the original individual evaluations as part of their packets. Mr. Strogatz explained that those documents would take too much time for the Associates Committee members to review. The members receive the bottom line memo with its grid as a starting point before the Associates Committee meets. They also receive the summary of evaluations compiled by Ms. McMahon, and reflected on standardized forms.

57. Mr. Strogatz testified that the Associates Committee has no formal voting procedures, but that sometimes the members poll themselves. The committee also formulates a performance review that will be given to each associate and the Associates Committee member who is responsible for giving that review is told at the meeting by the committee what the reviewer should say.

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58. Since 1987, the judgment of the Associates Committee concerning a senior associate's prospects for partnership has been reflected on a form. The form lists as possible ratings for the associate's promotion to regular partnership as "More likely than not," "unclear," "less likely than not," or "unlikely." Similar rankings are used for the likelihood of the associate's promotion to special partnership. That form is given to the associate at the oral review by the responsible Associates Committee member. At the oral review, the consensus of the Associates Committee regarding that candidate is communicated to the candidate by the responsible Associates Committee member.

59. The Chairman of the Associates Committee reports the recommendation of the committee to the Executive Committee, which has the ultimate authority for recommending to the full partnership the election of candidates to partnership. The full partnership does not vote on candidates not recommended.

*8 60. **In the period up to and including 1988, Ms. Ezold received strongly positive evaluations from almost all of the partners for whom she had done any substantial work.** In 1987 and 1988, the process of evaluating the plaintiff's

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Department, wrote to Mr. Kurland:

Just a note to express my great satisfaction with the manner in which Nancy -->

Ezold has handled a claim against the Union League, which was forwarded to me by a classmate of mine in Boston.

I like everything about the way Nancy has taken hold, including her research, her meeting with all opposing counsel and her handling of her clients.

Nancy really is top notch.

62. Prior to his leaving Wolf, Block in 1987, Mr. Kurland believed that Ms. Ezold should be admitted to partnership. He wrote in his 1987 evaluation

Nancy is an exceptionally good courtroom lawyer, instills confidence in clients, gets things done, is unafraid and has all the qualifications for partnership.... What I envisioned about her when I hired her was a good, stand-up, effective courtroom lawyer remains to be true and I think she has proven her case....

63. In his 1987 evaluation of Ms. Ezold, Mr. Boote write that Ms. Ezold "is a valuable asset to the firm." He also wrote:

[C]riminal, negligence, commercial contract cases are all well within her ability. Moreover, in these areas she presents herself to the court and clients as an effective representative of the firm. I would trust her to handle many significant [matters] on her own.

Mr. Boote voted with favor for partnership for Ms. Ezold in 1987 and 1988.

64. In 1988, Mr. Boote rated Ms. Ezold's legal analysis as "good." He had rated her as "acceptable" in that category in 1987.

65. In 1987, Steve Goodman, a partner in the Corporate Department and a member of the Executive Committee who had had substantial contact with Ms. Ezold, rated her overall legal skills and her legal analysis and legal writing abilities between "distinguished" and "good." He wrote

She worked very closely with Greg [Magarity] on an important matter for me and I was very favorably impressed with her work. She also successfully handled a matter that required much legal analysis and client hand holding.

* * *

She is one of the first people I call to handle any litigation matter. She has always justified my high confidence in her.... I sense some old perceptions--baggage--which should be revisited.

Mr. Goodman suggested that Ms. Ezold needed "Better p.r. [public relations]." (emphasis added).

66. Mr. Goodman wrote in his June 1988 evaluation of Ms. Ezold:

I think she handles herself extremely well in both formal and informal settings.... She craves and reaches out for more responsibility.... Has shown industriousness, dedication, good judgment and client skills in several matters. I get the sense she should have [the] opportunity for greater independent responsibility.

*9 67. In 1987, the last year in which he evaluated Ms. Ezold's legal analysis and writing ability, Mr. Schwartz, a Litigation Department partner,

rated her in those areas as "good." He wrote: Nancy has made tremendous

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distinguished in all personal qualities, a grade he also gave to her informal speech skills and negotiating skills.

68. Mr. Davis, the Chairman of the Litigation Department at the time, wrote in his June, 1988 evaluation of Ms. Ezold:

Last year I assigned Nancy to assist me in the Home Unity Securities Litigation and a related SEC investigation. Complex civil litigation was new to her. She had to learn about pretrial orders, class certification, responses on objections to lengthy sets of interrogatories and all of the other sophisticated phases of such litigation. With the help of forms from other cases, she produced first class documents. She also managed two complex document productions, including inspection, developing a privilege list, both stamping and putting out the daily brush fires between counsel. Her ability to become so useful and effective in so short a time was truly amazing. Opponents respect her. The Home Unity officers and Directors are crazy about her, and have said so. Nancy is another one of those people who is here weekends and nights--she has difficult family responsibilities. She never complains about workload and is always available. She is one of two or three people who will

march into court and handle a preliminary injunction on an hour's notice. The Home Unity case was the first really fair test for Nancy. I believe that her background relegated her to ... matters (where she got virtually no testing by Wolf, Block standards) and small matters. She is much, much better than that. I could handle any case with Nancy and she will soon be able to handle major cases independently--she can do so now, in my opinion, in consultation with an experienced partner. Moreover, she can try cases because of her guts and maturity. That is not true of all of our litigators.

69. Mr. Davis stated that when he wrote his evaluation of Ms. Ezold in 1988 he believed "that it had been established that Nancy had excellent skills in various areas of litigation, including case management, document management, witness preparation, dealing with opponents, professionalism, maturity, aggressiveness and a whole series of other traits that I considered to be extremely useful to the department." He believed she could make a valuable contribution as a junior partner in the Litigation Department.

70. Raymond Bradley, a senior litigation partner, wrote in his June, 1988 evaluation of Ezold:

Although my contacts with Nancy have not been extensive, I have had the opportunity to review several briefs that she wrote and to discuss with her problems on which she was working. I have been impressed by her ability to grasp issues and to think and write about them creatively. She has a good

sense of what can and cannot be accomplished.... I think Nancy is a very hard worker who is enthusiastic about her assignments and committed to the interests of the firm and its clients.... She gets things done. Writes very well. Has a good eye for the practical.

*10 71. Ms. Ezold's overall score in legal skills in the 1988 bottom line memorandum presented to the Associates Committee was a "G" for good. It was noted that "overall" she received that year "stronger grades in intellectual skills than last time."

72. The plaintiff, as an associate, needed supervision and guidance from partners as do most, if not all, associates. The mistakes of the plaintiff were not of a greater magnitude or type than were those of male associates who

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to the most junior of partnerships, she must demonstrate that she had the analytical ability to handle the most complex litigation was not the test required of male associates.

74. Mr. Davis, Chairman of the Litigation Department of the Firm, testified regarding the erosion of the standards of the associate pool at the Firm:

At the time we were required to work three nights a week and, if you were smart, you would work four, and you would work on Saturdays. We were always

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having lunch together, dinner together. The discussion would always be about the law. We would write briefs. We would spend hours on a sentence. We would turn out product that was worthy of General Motors for Sam's Gas Station, because that's who we represented.

The place was indescribably brilliant. And it just isn't that way today. With all deference to some of my young partners who are sitting out there, and they are very, very good, you can't even imagine the way it was in the 1960s. And as time went by, instead of getting the top offers from law officers of Law Review, we began to get people who didn't make officer at Law Review, and then we started to go off Law Reviews and then started going deeper into classes, and thankfully, because discrimination started to relax and erode, we began competing in the market with everybody else. And as a result, the pool of people we had to choose from was the same pool of people everybody else had to choose from, and there were good people and bad people and mediocre people and medium people.

75. **Male associates who received evaluations no better than the plaintiff and sometimes less favorable than the plaintiff were made partners.**

(1) Male Associate A

76. **Associate A, an associate in the Litigation Department, was recommended by the Associates Committee in 1988.** Robert Fiebach, who stated that he had had "substantial contact" with Associate A's work, wrote in his **1986 evaluation** of

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him:

I really don't think [Associate A] should become a partner. In fact, if he is made a partner, I will never again submit an evaluation on any associate. I don't know how he has lasted this long in the firm.

77. Mr. Fiebach testified that his 1987 evaluation showed that Associate A had made "substantial improvement." In Mr. Fiebach's **1988 evaluation** of Associate A, Mr. Fiebach did not mark Associate A as distinguished in any category, but he "found enough skills in the good and acceptable category to be comfortable recommending him for partner." **He marked Associate A's legal analysis "acceptable."** Thus, according to Mr. Fiebach, Associate A had substantially improved to the level of "acceptable" in legal analysis, a rating lower than the overall rating in that area that Ms. Ezold received on her bottom line memo.

*11 78. Barry Klayman, a partner in the Litigation Department, wrote in his fall 1986 evaluation that he "could not rely on [Associate A] to back [him] up in the office while [Klayman] was in court. [Associate A's] writing is dense and mediocre. He missed target dates for completing projects and then hurriedly slapped together something when I complained."

79. Mr. Davis wrote in his **1985 evaluation** of Associate A:

At first glance his work looks adequate, if uninspired. However, if you dig under the surface you find a lack of professionalism, both in terms of legal

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analysis and research. The case on which I worked most deeply with Associate A was a preliminary injunction action in Federal Court. He alleged jurisdiction under the wrong statute and missed a pertinent Supreme Court case that would have shot out at him from rudimentary shepardizing of cases he did cite. The complaint was drafted with bare bones adequacy and the memorandum was superficial and uninspired. The client did not feel that [Associate A] was terribly interested in his case and mentioned his concerns to me. [Associate A] must be useful in our woefully understaffed department because he will take on matters and does get the paper out. However, his work product should be below our minimum standards and I believe his intellectual laziness will some day embarrass us.

80. Mr. Davis wrote in his 1988 evaluation of Associate A:

[Associate A] is strictly average. I think he would fade into the background in a group of adversaries representing multiple interests in a complex matter. He does not have or give the appearance of having a winning attitude. I do not believe he will ever attract significant business. His principal strength seems to be that he has not seriously offended anyone important and is useful as a utility man. In my opinion, we have enough partners like [Associate A].

81. In his 1988 evaluation of Associate A, David Kaufman, a partner in the Estates Department, ranked Associate A's writing skills as "unacceptable." David Glyn, another partner in the Estates Department, rated Associate A's

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abilities in those areas as "marginal," and concurred in Kaufman's view that Associate A "should receive help with writing skills."

82. In 1988 the year in which he was recommended for partnership, Associate A had legal skills that were characterized by Mr. Arbittier as: "Acceptable--Merely adequate." Mr. Arbittier also described him as "[n]ot real smart."

83. In 1988, Anthony Minisi, a litigation partner, evaluated Associate A as follows: "[Associate A] worked on a major matter for me and was not responsible. He was extremely slow in responding."

84. In 1986, Mr. Strogatz wrote that "the partnership issue for [Associate A] depends upon what our standard is going to be."

85. In 1987, Mr. Strogatz wrote: "[Associate A] is pretty good overall, but not quite good enough." Mr. Strogatz wrote that he was concerned that Associate A "may not be bright enough."

86. Associate A's bottom line grid for 1988 summarized his legal analysis grades as "good" and his writing and research as between "acceptable" and "good." His overall ratings thus were lower than those of Ezold.

(2) Male Associate B

*12 87. The Associates Committee recommended Associate B, a litigation associate, for partner in the fall of 1989.

88. In May 1989, David Simon, a litigation partner who described his experience with Associate B as "extremely extensive," stated in a memorandum to

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the Associates Committee: "There has been a recurrent problem where he simply disappears without notice, sometimes for a couple of days, and sometimes on extended vacations." Mr. Simon also described Associate B's "lack of judgment in dealing with a major client" that almost resulted in the defendant's losing a million dollars a year in billing.

89. Mr. Arbittier wrote of Associate B in 1989

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The 1989 evaluation form shows that Mr. Arbittier's contact with Associate B in the prior year was "none."

90. In 1988, Mr. Arbittier had described his "impression" of Associate B:

Seems bright, but he is a bit of a con man. Not as smart as he seems or thinks he is. Nevertheless, I think he has potential. More sizzle than steak.

91. Mr. Schwartz wrote of Associate B in 1988, the year before his admission to partnership: "He's just too slick to instill ... that degree of comfort." Norman Goldberger, another litigation partner, wrote:

... I'm beginning to think he doesn't want to work hard or on difficult matters. Maybe he has trouble juggling but I'm beginning to believe he doesn't go the entire mile.

92. In the same year, Ms. Liebenberg wrote:

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I think [Associate B] is very lazy and when an assignment or case does not interest him, he only gives the matter minimal attention. I have been very disappointed in the work he has done for me to date.... The client has been very unhappy with [Associate B's] performance. He was late in completing the assignment and did not follow through with the client's problem.

Ken Warren, a litigation department partner, also wrote of Associate B in 1988:

[He] needs to apply himself diligently to learn more. He does not seem willing to do this.... [He] is too anxious to give his work to others. He needs to take a task from start to finish. He appears to work to avoid responsibility.

93. Associate B became a partner in February 1990.

(3) Male Associate C

94. Associate C, an associate in the Real Estate Department, was recommended by the Associates Committee in 1987. In the 1987 Associates Committee bottom line memo, he received an overall grade of "G," the same as that which Ms. Ezold had received. The summary of evaluations used by the Associates Committee noted that Henry Miller, a partner in the Real Estate Department, had changed Associate C's legal analysis score to ["acceptable"] and suggested that an "adequate [score] may well be sufficient in his mind for regular partnership."

95. Associate C became a partner in February 1988.

(4) Male Associate D

96. Associate D, an associate in the corporate department, was recommended for partner by the Associates Committee in 1988. In the 1988 evaluation summary sheet reviewed by the Associates Committee, three partners said that Associate D needed help with his writing skills.

*13 97. In 1987, Mr. Strogatz described Associate D as "not institutionally dedicated." He also said that Associate D was "not particularly able" in "client servicing and development." The prior year Mr. Strogatz had written that Associate D had "not applied himself in such a way as to develop into a first-rate lawyer ... I am not impressed."

98. In 1988, J. Goldberg, a partner in the Corporate Department, wrote in his evaluation that Associate D "[t]ends to shoot from the hip. Leaves me with a feeling of uncertainty...."

99. At the same time, Joseph Manko, a partner in the environmental law department, wrote that Associate D was "less than tactful."

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[illegible]
did not need to be a star to be a partner. He also wrote that he thought of Associate E "as a guy just to do work."
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102. Associate E, who was in the Estates Department, was made partner in 1987.

(6) Male Associate F.

103. The grid on Associate F's bottom line memo in 1988, the year before his consideration for partnership, reflected a composite grade of "G-" for legal analysis.

104. Associate F had graduated from Villanova Law School and had not been on Law Review.

105. In 1989, the year in which he was recommended for partnership, Associate F was described by Alan Kaplinsky, a partner in the Corporate Department, as having as a weakness: "His outrageous personality. He offended terribly my father-in-law in connection with work which he did for him a year or so ago. My father-in-law changed law firms as a result."

106. John Schapiro, then a partner in the Tax Department wrote of Associate F: "A little superficial and hipshooting."

107. The prior year Donald Joseph, a partner in the Litigation Department, had rated Associate F's legal skills as acceptable, noting "a shoddiness in clear thinking or maybe lack of full experience."

108. At the same time, Michael Temin, a partner in the Corporate Department, recommended that Associate F receive help in his writing and drafting skills.

109. Norman Goldberger in 1987, described inappropriate conduct by Associate F:
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[Associate F] was supposed to be handling a matter for Henry Miller's client, Hart. I was asked to step in and help supervise. [Associate F] immediately abandoned ship. He failed to follow up with local counsel, call me, provide me with papers or do anything related to the case. Indeed, when called upon by my secretary to provide information, his response was that the case was my case and not his.

110. In 1986, William Rosoff evaluated Associate F:

[H]e is sometimes too fast or flip or not attentive enough. In one matter, he failed to collect on a letter of credit on the grounds that he supposed Al Braslow would handle that part of the matter, when it was an inappropriate assumption to make especially without talking to Al. In another matter, the time for answering a complaint expired. While he might have thought someone else was seeing to it, he should have double checked.

*14 111. Associate F became a partner in February 1990.

(7) Male Associate G

112. In the bottom line memorandum on Associate G for 1987, the year before he became partner in the Corporate Department, his grid reflected no composite score higher than "G." In four of the legal skills, including legal research and promptness, Associate G was rated only "acceptable."

113. In his 1987 evaluation Associate G was rated "acceptable" in legal analysis by Alan Molod, a partner in the Corporate Department. Mr. Molod added

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that Associate G was "Not a Star" and was "Sloppy at times and [showed]

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other times he takes a very extreme 'hard-nosed' and confrontational approach. He needs to be more consistently firm and businesslike and in control."

115. Associate G was admitted to partnership in February 1988.

(8) Male Associate H

116. Mr. Arbittier wrote in his 1987 evaluation of Associate H:

[Associate H] has really let me down in his handling of a case for General Electric Pension Trust. He missed the crux of the case in the beginning and dragged his feet terribly in getting it back on track.... [Associate H] works very hard, but hard work alone is not enough. I have my doubts that he will ever be anything but a helper who does what he is told adequately but with no spark.

Mr. Arbittier wrote that Associate H was trying "to change my view of him and I am giving him a second chance. He [has] brains. Maybe he can change." Mr. Arbittier also called Associate H "phlegmatic, diffident, nonassertive and unimagina-tive," and in 1988 wrote that he was "[not] real strong in legal analysis or in focusing on the key issues (dividing the wheat from the chaff)."

117. In 1989, Mr. Arbittier concluded that Associate H was a "nice guy" who

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had made improvement: he supported Associate H for partnership. Mr. Arbittier explained Associate H's "redemption": Associate H told Mr. Arbittier how he had been overworked.

118. Associate H became a partner in February 1990.

119. The plaintiff's analytic skills were assessed in the bottom line memo in her final year as the second highest potential rank, "good," which, according to Wolf, Block standards means "Displays particular merit on a consistent basis; effective work product and performance; able; talented."

120. The plaintiff was criticized by her supervisors for not being "politic" when she pressed for some matter relating to her personally. Some male associates were criticized on their evaluations for not being assertive.

121. In the magnitude of its complexity, a case may have a senior partner, a younger partner, and an associate(s) assigned to a case. Accordingly, requiring the plaintiff to have the ability to handle on her own any complex litigation within the firm before she was eligible to be a partner was a pretext.

122. Mr. Strogatz, Chairman of the Associates Committee, recalls a discussion, possibly at an Associates Committee meeting, that Ms. Ezold "sees things ... as being in discrimination terms."

*15 123. Mr. Strogatz testified about a memorandum memorializing complaints against Associate X of sexual harassment. Secretaries and paralegals said

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Associate X had touched them or pestered them. The memorandum states that Mr. Strogatz had arranged to have Arden Resnick, an administrative employee in the personnel department, talk to Associate X in a "low-key manner" about those past incidents, and the memorandum recounted a more recent incident where Associate X had touched and flirted in an unwelcome fashion with a secretary. Mr. Strogatz' memo described the secretary as "afraid."

124. Mr. Strogatz testified that his job was not to determine the truth of the allegations against Associate X; he wrote that he did not believe Associate X's story concerning the incident.

125. Mr. Strogatz also stated that he did not feel that the incident concerning Associate X was relevant to considerations of whether or not the

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her relationship with clients, Mr. Strogatz explained his marginal rating of Ms. Ezold on this aspect was not based on any facts, but was based on his view that a "prima donna" such as Ms. Ezold would probably not be very good with dealing with clients.

127. In the plaintiff's early years at Wolf, Block, she suggested to Mr. Schwartz that an unfairness in case assignment may have occurred because she was female. Mr. Schwartz replied: "Nancy, don't say that around here. They

don't want to hear it."

128. The plaintiff was identified as too involved in women's issues by Mr. Schwartz, who wrote in his 1986 evaluation of her that "her judgment can be clouded by over sensitivity to what she misperceives as women's issues." That evaluation was submitted in the ordinary course to the Associates Committee and was discussed by the Associates Committee. Mr. Rosoff testified that he reviewed Mr. Schwartz' evaluation during his review of the Associates Committee's decision on Ms. Ezold, and noted that comment concerning women's issues as he reviewed her file.

129. Mr. Schwartz recalled Ms. Ezold's expression of concern for paralegals employed by the defendant as a "women's issue." The plaintiff had discussed with Mr. Schwartz complaints by paralegals that they were not paid for overtime hours, for work at night or on weekends. Virtually all of the litigation paralegal staff was female.

130. The defendant asserted that Ms. Ezold had misperceived the problems of the virtually all female paralegal staff as a "women's issue." Mr. Fiebach, however, stated that he brought up the issue of attorneys working part-time at Wolf, Block, which was "well known to be a women's issue." Mr. Strogatz stated that Mr. Fiebach was not using bad judgment in raising that question as a women's issue. Ms. Ezold's characterization of matters affecting largely female groups as "women's issues" was evaluated differently.

*16 131. The fact that a male associate had engaged in sexual harassment of female employees at the Firm was seen as insignificant, not worthy of mention to the Associates Committee in its consideration of the male associate for partnership. This despite the fact that "integrity" is a minimal requirement for partnership at the Firm according to the testimony of members of the Associates Committee.

132. The plaintiff was criticized for being "very demanding" and was expected by some members of the Firm to be nonassertive and acquiescent to the predominately male partnership. Her failure to accept this role was a factor which resulted in her not being promoted to partner. However several male associates who had been evaluated negatively for lacking sufficient assertiveness in their demeanor were made partners.

133. Mr. Kopp, Chairman of the Executive Committee, offered Ms. Ezold a partnership in one year if she took over the Domestic Relations Division of the Litigation Department. It was the history of the Firm that the recommendation of the Executive Committee of an associate for admission to partnership was followed without exception.

134. Before Ms. Ezold could be admitted to partnership, she would have to serve an additional year as an associate. The additional year was not for purposes of giving any additional training or experience. Accordingly, the Chairman of the Executive Committee was satisfied that in 1988 the plaintiff

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had all the requisites to be a member of the Firm at that time.

135. Gender was a determining factor in the failure of the Firm to promote the plaintiff to partnership in 1989.

CONSTRUCTIVE DISCHARGE

136. On October 18, 1988, the Chairman of the Litigation Department, Mr. Davis, and two members of the Associates Committee, Arthur Block and Norman Goldberger, met with Ms. Ezold and advised her that she would not be recommended for admission as a regular partner effective February 1, 1989. She was told that too many partners did not believe she had sufficient legal analytical ability to handle complex legal issues. However, they also emphasized to her that the Firm very much wanted her to stay.

137. On November 16, 1988, Ms. Ezold met with Mr. Kopp, Chairman of the Executive Committee, who told her that the Executive Committee would not be recommending to the partnership that she be admitted as a partner effective February 1, 1989. However, Mr. Kopp told her that the two partners who had handled the Firm's domestic relations work (David Hofstein and Judith Widman) had announced their decision to leave the Firm several days earlier, and the immediate staffing need in this practice created by their impending departure enabled him to offer her a position which had not been anticipated previously. He told Ms. Ezold that, in light of the particular skills that the Executive Committee had been told that she possessed, he believed she would be well-

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suited and well-qualified to head up the Firm's domestic relations practice (which was part of the Litigation Department), and if she agreed to do so, he promised that she would be made a regular partner in one year.

*17 138. In deciding to make the domestic relations partnership offer to Ms. Ezold, Mr. Kopp took into consideration the fact that he believed the legal issues which arise in the domestic relations matters handled by Wolf, Block are generally not as complex as those which arise in commercial litigation matters. He also took into consideration the fact that Wolf, Block had an immediate and pressing need to fill the vacuum which would soon be created by the impending departure of Mr. Hofstein and Ms. Widman.

139. Ms. Ezold told Mr. Kopp that her reaction to the domestic relations partnership offer was negative. Mr. Kopp told her that even if she did not accept that offer, the Firm nevertheless wanted her to stay, and she could continue doing the same type of general litigation work she had done in the past and would receive a substantial increase in salary.

140. Subsequent to her meeting with Mr. Kopp, Ms. Ezold did speak with Mr. Magarity, Mr. Schwartz and Mr. Davis concerning the domestic relations partnership offer, and none of them told her that they believed that this offer was inappropriate or that acceptance of it would be harmful to her career.

141. Shortly after her meeting with Mr. Kopp, Ms. Ezold had a couple of meetings with Mr. Rosoff to discuss the domestic relations partnership offer

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and her future prospects for partnership if she declined that offer. Mr. Rosoff told her that Wolf, Block operates on a consensus basis with respect to partnership admission decisions, and a number of partners did not believe that she had sufficient legal analytical ability to handle complex legal issues. He urged her to accept the domestic relations partnership offer and told her that acceptance of that offer would not preclude her from also handling general

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having her head up the domestic relations practice merely on a short-term basis.

142. Mr. Rosoff reiterated to Ms. Ezold that the Firm wanted her to stay and told her she "could stay as long as she wanted." He told her that although he could not assure her of a partnership in the future if she declined the domestic relations partnership offer, **she would be considered for partnership in the future.** He also told her that she would receive substantial pay increases beginning in the following July, when semi-annual raises are customarily given to the Firm's associates, but would not give her a pay raise that was then being given to the other members of her class.

143. The domestic relations practice at Wolf, Block was formerly headed by a male (Mr. Hofstein), and a number of different male partners handled domestic

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relations matters prior to the time Mr. Hofstein came to the Firm. Domestic relations matters are now handled by two of Wolf, Block's senior male partners (Gerald McConomy and Anthony Minisi).

*18 144. The domestic relations practice at Wolf, Block is part of the Litigation Department, and Ms. Ezold admitted that the Firm's domestic relations lawyers "went into court probably the same or a little more" than the other lawyers in the Litigation Department.

145. Ms. Ezold admitted that **she did not consider her working conditions at Wolf, Block to be "intolerable"** prior to the January 24, 1989 partnership vote.

146. No partner at Wolf, Block told Ms. Ezold that the Firm wanted her to leave.

147. Ms. Ezold was not harassed, belittled or otherwise pressured to leave Wolf, Block.

148. None of the cases that Ms. Ezold was working on at the time of the January, 1989 partnership vote were taken away from her or re-assigned, and Mr. Davis continued to assign her new cases. Ms. Ezold admitted that she remained "busy" and "fully occupied" after the partnership decision.

149. Ms. Ezold tendered her resignation in May, 1989 after she had secured higher-paying employment as President of BES Environmental Specialists (a Wolf, Block client) and an "Of Counsel" position with the law firm of Rosenthal and Ganister because she reasoned that her advancement at the Firm had reached a

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plateau.

150. Ms. Ezold quit working at Wolf, Block on June 7, 1989.

151. Ms. Ezold's working conditions at Wolf, Block were not intolerable, and a reasonable person in her position would not have felt compelled to leave.

CONCLUSIONS OF LAW

1. The plaintiff has fully complied with the administrative prerequisites for Title VII litigation. 42 U.S.C. s 2000e-5.

2. Under Title VII, the burdens and order of proof are as follows:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

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3. Therefore, a plaintiff in a sex discrimination case can establish a prima facie showing of promotion discrimination by demonstrating that she is a member of the protected class, that she was qualified for the position, that she was not promoted into a job for which she was qualified, and that the position was given to a male. See Dillon v. Coles, 35 FEP Cases 1239, 1242 (E.D.Pa.1983), aff'd, 746 F.2d 998 (3d Cir.1984).

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4. A plaintiff's burden of proof at the prima facie stage is easily met. See Bhaya v. Westinghouse Electric Corporation, 832 F.2d 258, 260 (3d Cir.1987), cert. denied, 488 U.S. 1004, 109 S.Ct. 782 (1989), citing Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.1983).

*19 5. A plaintiff need not demonstrate on her prima facie case of promotion discrimination that she was the most qualified, but only that she fell in the general range of those considered by a defendant for promotion. See Easley v. Empire, Inc., 757 F.2d 923, 930 n. 8 (8th Cir.1985).

6. The plaintiff here has made a prima facie showing of promotion discrimination. Her evaluations by the partners who worked most closely with her, and the bottom line memo which summarizes her reviews, establish her qualification for partnership at Wolf, Block. Several male associates with lesser evaluations were made partners.

7. After a plaintiff has established a prima facie case, the burden of going forward then shifts to the defendant "to dispel the adverse inference by articulating 'some legitimate, nondiscriminatory reason for the employee's rejection.'" Duffy v. Wheeling Pittsburgh Steel, 738 F.2d 1393, 1395 (3d Cir.), cert. denied, 469 U.S. 1087 (1984), quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

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8. A Title VII defendant's articulated reasons for the adverse employment decisions must be reasonably clear and specific if the defendant is to succeed in rebutting plaintiff's prima facie showing of discrimination. See Burdine, 450 U.S. at 255-56.

9. If the defendant succeeds in articulating a legitimate nondiscriminatory reason for its decisions, the plaintiff then "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision ... [she] may succeed in this either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256 (citations omitted).

10. "A showing that a proffered justification is pretextual is itself equivalent to a finding that the employer intentionally discriminated." Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir.), cert. denied, 469 U.S. 1087 (1984), citing McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973); see also Chippolini, 814 F.2d at 900. Pretext may be shown through the presentation of indirect or circumstantial evidence, or evidence that demonstrates inconsistencies or implausibilities in the employer's proffered reasons for its employment action. See Chippolini, 814 F.2d at 899-900.

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promoted male associates who the defendant claimed had precisely the lack of analytical or writing ability upon which Wolf, Block purportedly based its decision concerning the plaintiff. The defendant is not entitled to apply its standards in a more "severe" fashion to female associates. See Green v. United States Steel Corp., 481 F.Supp. 295, 313 (E.D.Pa.1979) (policy of rejecting applicants for "material misrepresentations" must be applied alike to all races); Waller v. Robbins Hose Co., 465 F.Supp. 1023, 1035 (D.Del.1979). Such differential treatment establishes that the defendant's reasons were a pretext for discrimination. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282-83 (1976).

*20 12. Other instances of conduct by the defendant Firm toward Ms. Ezold support the conclusion that the plaintiff was treated differently because of her gender. Ms. Ezold was evaluated negatively for being too involved with women's issues in the Firm, specifically her concern about the treatment of paralegals. Mr. Fiebach, a member of the Firm, was not reproached for raising the issue of part-time attorneys, which he himself characterized as a "women's issue." In addition, the fact that a male associate had engaged in sexual harassment of female employees at the Firm was seen as insignificant and not worthy of mention to the Associates Committee in its consideration of that male associate for partnership. Ms. Ezold was also evaluated negatively for being "very demanding," while several male associates who were made partners were evaluated negatively for lacking sufficient assertiveness in their demeanors. Finally, Ms. Ezold was the target of several comments demonstrating the defendant's differential treatment of her because she is a woman.

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CONSTRUCTIVE DISCHARGE

13. In order to establish constructive discharge, the plaintiff must establish that the employer knowingly permitted conditions of discrimination so intolerable that a reasonable person would feel compelled to resign. See Spangler v. Valley Forge Sewer Authority, 839 F.2d 171, 173 (3d Cir.1988), citing Goss v. Exxon Office Systems Co., 747 F.2d 885, 888 (3d Cir.1985).

14. Constructive discharge cannot be based upon the employee's subjective preference for one position over another. See Jett v. Dallas Independent School Dist., 798 F.2d 748, 755 (5th Cir.1986), aff'd in part, remanded in part, 109 S.Ct. 2702 (1989); Kelleher v. Flawn, 761 F.2d 1079 (5th Cir.1985); Neale v. Dillon, 534 F.Supp. 1381, 1390 (E.D.N.Y.), aff'd, 714 F.2d 116 (2d Cir.1982).

15. A denial of promotion, even if discriminatory, does not alone suffice to establish constructive discharge. See Nobler v. Beth Israel Medical Center, 702 F.Supp. 1023, 1031 (S.D.N.Y.1988).

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16. A reasonable person in Ms. Ezold's position would not have deemed her working conditions to be so intolerable as to feel compelled to resign.

ORDER

AND NOW, this 27th day of November, 1990, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED:

(1) As to the Plaintiff's claim that the Defendant refused to promote the Plaintiff to partner on the basis of her gender, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. s 2000e et seq., judgment is entered in favor of the Plaintiff, Nancy O'Mara Ezold, and against the Defendant, Wolf, Block, Schorr and Solis-Cohen;

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Block, Schorr and Solis-Cohen, and against the Plaintiff, Nancy O'Mara Ezold.
E.D.Pa.,1990.
Ezold v. Wolf, Block, Schorr and Solis-Cohen

1990 WL 186924 (E.D.Pa.)
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Chairman FORD. Thank you very much.

Ms. Klein.

Ms. KLEIN. Yes. Mr. Chairman, members of the committee, my name is Freada Klein. I will try to keep my remarks brief.

I have been working on the issue of sexual harassment in employment and educational institutions for 15 years. In 1976, I cofounded the first organization in the United States to deal exclusively with these problems. I hold a Ph.D. in social policy and research, and authored my dissertation on the subject of sexual harassment.

Since mid-1987, I have had my own consulting firm, focusing on issues of employment discrimination. Most of our clients are large corporations. Most of them contact us when there is a crisis, a crisis that may be brought by actual or threatened litigation or, more likely, when they find out, through mechanisms such as exit interviews, that a significant number of their employees have left the firm due to harassment and discrimination.

Our firm has been retained to conduct a survey of sexual harassment in the Fortune 500 by Working Woman magazine. I have a full report of those data and would be happy to enter that into the record. In addition, I have been retained as an expert witness in sexual harassment litigation approximately two dozen times and have testified in various state and Federal courts on nine occasions.

I want to summarize what we know about the incidence of sexual harassment in employment. The complaints made to employers are the tip of the iceberg; they are minimal. The lawsuits filed are even more remote and less a reflection of what is going on out there. Study after study, our data and the studies of others, suggest that 15 percent of women in the U.S. labor force and 5 percent of men in the U.S. labor force experience sexual harassment on an annual basis.

As with Jackie's case, that starts subtle and escalates over time. The perpetrators are peers, are immediate supervisors, and others at the companies with more power over the victim.

Across the country, across industries, we find that 1 percent of women in the U.S. labor force are sexually assaulted on the job each year. That is not a trivial figure.

Mr. HENRY. Assaulted?

Ms. KLEIN. Sexually assaulted, yes. And I was interested in Jackie's comment about her company's response, her employer's response, that that was horseplay. I have currently been retained as an expert in a case in California where the woman, a truck driver, filed a sexual assault charge against her co-worker with the local sheriff's office. Her employer has responded that it was horseplay.

There is a chart in my prepared testimony that shows the forms of unwanted sexual attention experienced by both men and women in the labor force and will show you that figure on sexual assault. As we can see, most of it is at the more subtle end of the spectrum, it is unwanted, persistent, sexual remarks, teasing, jokes, or questions. In 75 percent of cases, sexual harassment starts there and, despite the clear objection of the victim, it escalates.

Dr. Mary Rowe of the Massachusetts Institute of Technology and I have concurred, comparing both proprietary and published data, on complaint rates of sexual harassment. In our combined research, 90 percent of sexual harassment goes unreported to the employer. Victims cite two primary reasons for refusing to come forward: first is fear of retaliation; and second is fear of loss of privacy.

Those fears are real obstacles. As the two courageous women who have testified here before me have pointed out, to bring a case is not to be made whole; it is to do a service to others. It is an act of courage; it is not an easy way to make a buck. The loss of privacy, the loss of career opportunity are real pitfalls, not only of experiencing discrimination, but certainly in trying to remedy it.

Currently, employers have not designed adequate complaint mechanisms to encourage victims to come forward. The responsibility of employers to do so was stated in the Supreme Court case, the *Meritor Savings Bank* case, in 1986, and reiterated in the 1988 EEOC guidelines.

Victims perceive that to come forward within their workplaces is to be labeled as "troublemakers" or "oversensitive," and many employees in many companies will tell you to make any allegation of discrimination is known as a career-limiting move.

Measures such as the proposed bill will, I believe, encourage employers to design and implement complaint structures which encourage victims to come forward by overcoming the fear of retaliation and the fear of loss of privacy. We know that the perception of available workplace remedies changes dramatically if one experiences any form of employment discrimination and tries to avail themselves of the remedies that the employer provides.

In my prepared testimony there is a chart, chart B, that shows the significant decline in the confidence in those remedies between employees who have not experienced employment discrimination and those who have. Most employees believe that the policies their employers have put in place are fair, are adequate, and that both formal and informal complaint structures are adequate, until they try to use them. They then find the experience of being ostracized, of having their careers hit a dead end, and being labeled as troublemakers by their employers.

I want to address also the impact on the victim and on the workplace of sexual harassment. Individuals who experience sexual harassment report an array of consequences, including substantial deterioration of physical and mental health. There is also a loss of confidence in one's ability to perform one's job or to pursue one's career goals and diminished productivity at a statistically significant level.

Sexual harassment victims report fear, anxiety, guilt, and depression. Even those who have been successful plaintiffs, especially women in nontraditional occupations, find that they are unable to return to that occupation for the balance of their working lives. The climate in those organizations is too familiar and too hostile.

Our proprietary research indicates that sexual harassment victims suffer statistically significant declines in self-esteem and an increase in their stress levels. Negative consequences ensue to the employer as well. And, again, there is a final chart C in my prepared testimony that depicts those. It shows that to allow sexual harassment to go on is simply not good business.

There are statistically significant drops in job satisfaction, confidence in senior management of the firm, the perception of the competence of one's immediate supervisor, the credibility of organizational communications. There is also reduced pride and loyalty, understandably, to the employer who is allowing one to be a victim of harassment or discrimination. And, in some instances, for sexual harassment alone, a doubling in the likelihood of the victim to leave the firm.

We see that one instance of unwanted sexual attention shows a decline; further, two or more instances of sexual harassment show a further statistically significant decline. Whether the organizational purpose is public service, delivery of health care, or other services, or the production of goods, sexual harassment undermines its attainment.

Finally, I want to address the inadequacy, as I perceive it, of Title VII's current remedial scheme. In my opinion, current remedies under Title VII fall far short of, first, making victims whole for their losses; second, encouraging victims to come forward to enforce the statute; and third, and especially, deterring future discriminatory behavior by employers.

In many cases, the tangible economic loss arising from discrimination is minimal. Yet, as we have heard from the two women who have testified ahead of me today, the psychic toll and future career impact are devastating. Plaintiffs are often effectively ostracized from their chosen careers. And, as I have mentioned, women in nontraditional employment, who are especially vulnerable, are barred from nontraditional employment, rendering them unable to earn adequate wages.

Allowing full compensatory and punitive damages would remove some of the barriers to employees' willingness to pursue litigation. More importantly, however, it would provide a stronger incentive for employers to implement effective remedies for intervention and prevention, which I think is the real goal.

We know that the single greatest impetus for employers to adopt policies prohibiting sexual harassment was the issuance of the EEOC guidelines on sexual harassment as a form of sex discrimination in 1980. Further, the Supreme Court decision in 1986, the *Meritor Savings Bank* case that I mentioned, propelled the amending of policies and the implementation of training in large corporations in this country, attributable to no other reason.

Data suggests, therefore, that employers do indeed implement measures to interrupt and prevent employment discrimination when they perceive that there is increased liability. The current remedies allow a bottom-line-oriented CEO to merely buy off a complaint. I am well aware of that happening dozens of times a year when I get contacted by clients.

Several senior managers of human resources and employee relations have confided, with exasperation, that the senior management team explains their decisions, such as—and this is a quote from a recent one—"If I can settle her complaint for a quarter of a million dollars and keep the accused, the harasser, who brings in four million a year, it is the cost-effective thing to do."

The new civil rights bill must do all it can to make eradicating discrimination the cost-effective course of action. Research indicates that a comprehensive approach does indeed make a difference. Employers that effectively and sincerely put five elements into place are successful at surfacing sexual harassment complaints early, before they escalate.

The five elements are: policies; complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice.

The real goal, it seems to me, of the Civil Rights Act of 1991 is the effective intervention and prevention of employment discrimination. The proposed legislation must be sufficiently strong to provide an incentive for every employer to implement these steps. Only then will the short-term interests, economically speaking, of the employer, the long-term interests of society, and the practice of human decency be consistent.

Thank you.

[The prepared statement of Freada Klein follows:]

STATEMENT OF DR. FREADA KLEIN
BEFORE THE HOUSE COMMITTEE
ON EDUCATION AND LABOR
February 27, 1991

1. Background.

My name is Freada Klein, and I have been working on the problem of sexual harassment for 15 years. In 1976 I co-founded the first organization in the U.S. to focus exclusively on sexual harassment. I hold a Ph.D. in Social Policy & Research and wrote my dissertation on the topic. In 1987 I started my own consulting firm dedicated to research, training and consultation on employment discrimination. The firm was commissioned to conduct a survey of sexual harassment in the Fortune 500 for Working Woman magazine in 1988. In addition, I have been retained as an expert witness in sexual harassment litigation--approximately two dozen cases throughout the U.S.--including by the EEOC.

2. Prevalence of Sexual Harassment in the Workplace.

Myself and others have conducted numerous published and proprietary studies of the incidence of sexual harassment in U.S. workplaces. Across these studies, an average of 15% of women and 5% of men are subjected to sexual harassment on the job annually. Most sexual harassment starts at the subtle end of the continuum and escalates over time. Each year, one percent of women in the U.S. labor force are sexually assaulted on the job. Our data are based on proprietary surveys for dozens of employers, ranging in size from 25 to over 100,000 employees. (Chart A shows the forms of unwanted sexual attention experienced on an annual basis by women and men in the private sector.)

Dr. Mary Rowe of M.I.T. and I concur that the overwhelming majority of sexual harassment goes unreported. In most organizations, at least 90% of sexual harassment victims are unwilling to come forward for two reasons: fear of retaliation and fear of loss of privacy. Currently, employers have not designed adequate complaint structures to overcome these fears. Victims perceive that to come forward will label them as "oversensitive" or "troublemakers", thereby hampering their career advancement. Further, sexual harassment is an inherently embarassing topic; coming forward with a complaint often evokes intrusive and irrelevant questions about the employee's dress, behavior and lifestyle. Employers need to be encouraged to design and implement complaint structures which encourage victims to come forward by overcoming these fears of retaliation and loss of privacy.

We know that the perception of available workplace remedies changes dramatically if one experiences any form of employment discrimination and tries to use their existing policies or complaint channels. Employees are likely to feel that existing policies, formal and informal complaint structures, and the commitment from senior management are adequate until they actually have to avail themselves of existing remedies. (Chart B illustrates the significant drop in confidence in remedies once one has experienced employment discrimination.)

Chart A:
TYPES OF UNWANTED SEXUAL ATTENTION EXPERIENCED WITHIN THE PAST YEAR

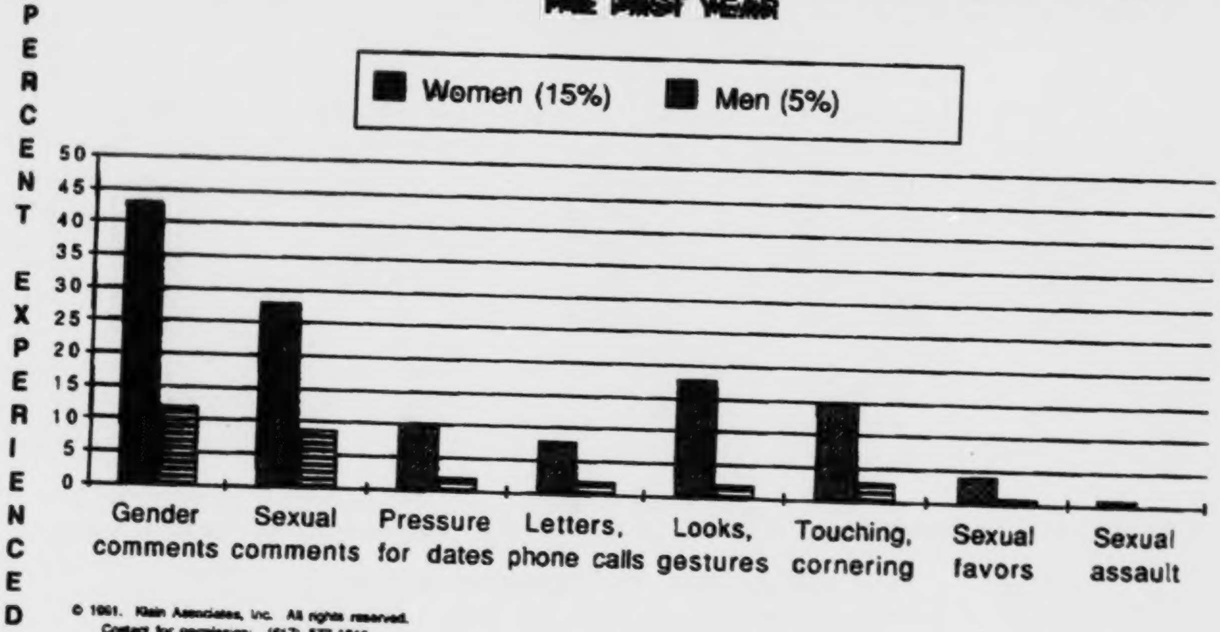

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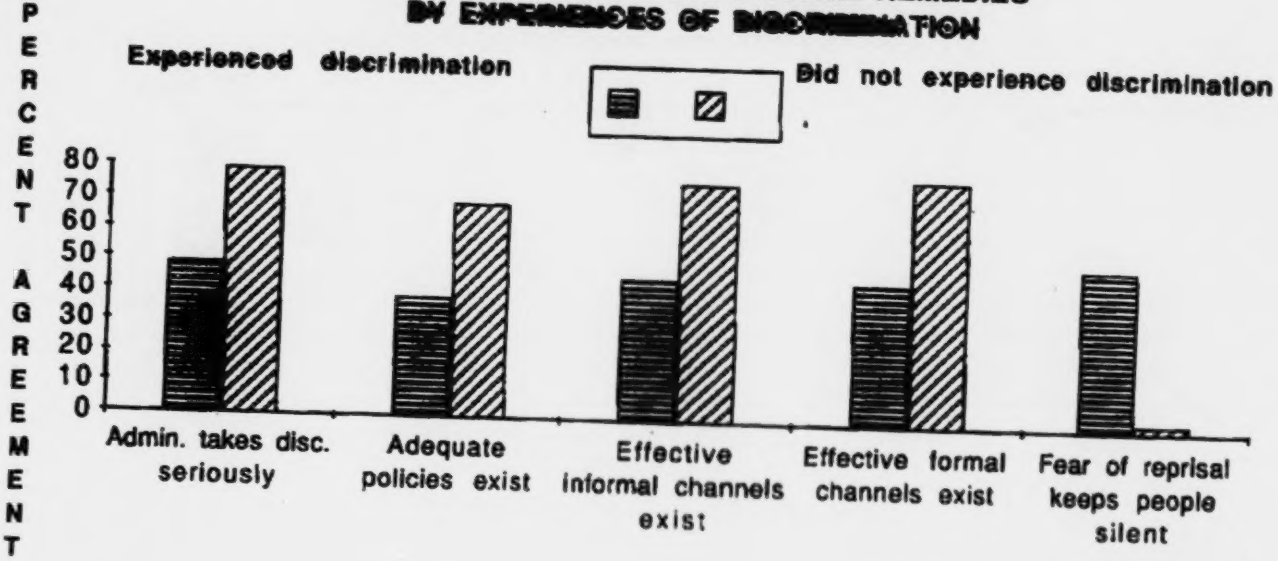
Chart B:
PERCEPTIONS OF INSTITUTIONAL REMEDIES BY EXPERIENCES OF DISCRIMINATION



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3. Impact of Sexual Harassment on the Victim & the Workplace.

Individuals who experience sexual harassment report an array of consequences, including: deterioration of mental and physical health; loss of confidence in one's ability to perform one's job and/or to fulfill career goals; and diminished productivity. Sexual harassment victims report fear, anxiety, guilt, and depression. In addition, they report substantial changes in eating and sleeping patterns, headaches, stomach ailments, and other physical symptoms of stress. Our proprietary research indicates that sexual harassment victims suffer statistically signficant declines in self-esteem, and statistically significant increases in stress levels.

Negative consequences ensue to the employer as well. Data from proprietary surveys of corporate employees indicate that: (Chart C depicts the impact of sexual harassment on organizational outcomes.)

- Employees who feel they have experienced sexual harassment once within the past year are substantially less positive about the following aspects of their employment, when compared to employees who have not experienced sexual harassment:
    - less job satisfaction
    - lower rating of their immediate supervisor
    - less favorable view of company communication
    - diminished confidence in their senior management team
    - reduced organizational commitment
    - increased likelihood to leave the company
- Employees who feel they have experienced sexual harassment two or more times within the past year report a further decline on each of these dimensions. While one experience of sexual harassment has a measurable impact on employees' views, repeated experiences have a cumulative, more negative impact.

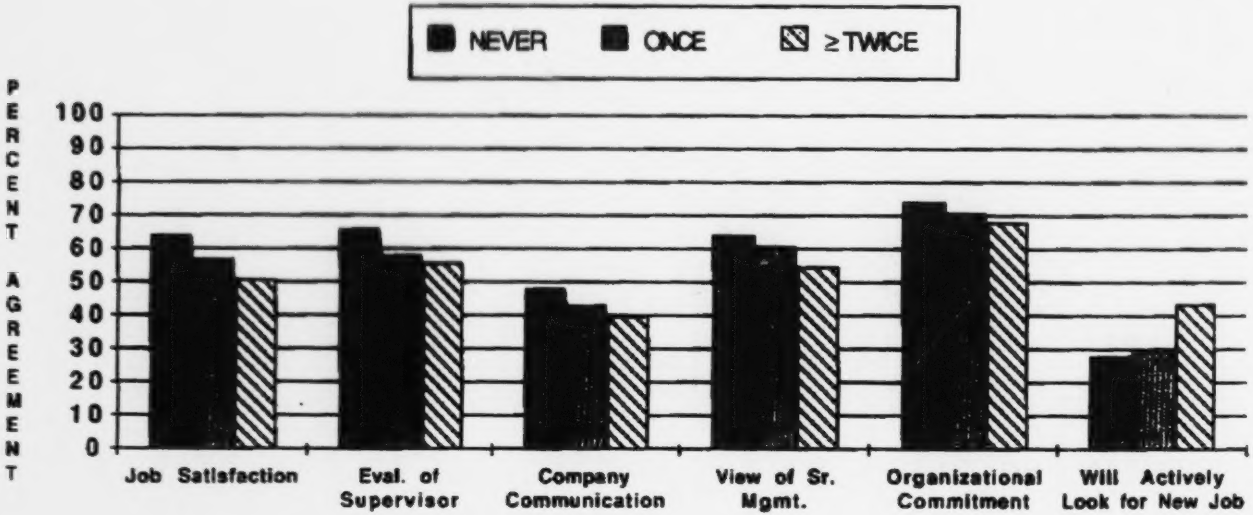
Whether the organizational purpose is public service, delivery of health care or other services, or production of goods, sexual harassment undermines its attainment.

4. Inadequacy of Title VII's Current Remedial Scheme.

In my opinion, current remedies available under Title VII fall far short of (1) making victims whole for their losses, (2) encouraging victims to come forward to enforce the statute, or (3) deterring future discriminatory behavior by employers.

In many cases, the tangible economic loss arising from discrimination is minimal, yet the psychic toll and future career impact are devastating. Plaintiffs are often effectively ostracized from their chosen careers. In cases of women in non-traditional employment, they often feel unable to return to any similar environment, rendering them able to choose only traditional--i.e. significantly lower paying--employment.

Chart C:
IMPACT OF EXPERIENCING SEXUAL HARASSMENT WITHIN THE PAST YEAR



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Allowing full compensatory and punitive damages would remove some of the barriers to employees' willingness to pursue litigation. More importantly, however, it would provide a stronger incentive for employers to implement effective remedies for intervention and prevention. We know that the single greatest impetus for employers to adopt sexual harassment policies initially was the issuance of the EEOC guidelines on sexual harassment in 1980. Further, the Supreme Court decision in 1986, Meritor Savings Bank v. Vinson, propelled the amending of policies and the implementation of training. Data suggest that employers do indeed implement measures to interrupt and prevent employment discrimination when there is increased liability.

The current remedies allow a bottom-line-oriented CEO to merely "buy off" a complaint. Several senior managers of human resources and employee relations have confided with exasperation that their senior management teams explain their decisions as "If I can settle her complaint for $250,000, and keep the accused who brings in $4 million per year, it's the cost effective thing to do." The new Civil Rights Bill must do all it can to make eradicating discrimination the cost effective course of action.

Research indicates that a comprehensive approach does indeed make a difference. Employers that put five elements into place are successful at surfacing sexual harassment complaints early, before they escalate. The five elements are policies, complaint structures (informal and formal), training, sensing or monitoring mechanisms, and unequivocal commitment from the top. The real goal of the Civil Rights Bill of 1991 is the effective intervention and prevention of employment discrimination. The proposed legislation must be sufficiently strong to provide an incentive for every employer to implement these steps. Only then will the short-term economic interests of an employer, the long-term economic interests of the society, and the practice of human decency be consistent.

THE 1988 WORKING WOMAN SEXUAL HARASSMENT SURVEY

Executive Report

by

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THE 1988 WORKING WOMAN SEXUAL HARASSMENT SURVEY

EXECUTIVE REPORT

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HIGHLIGHTS OF THE 1988 WORKING WOMAN SEXUAL HARASSMENT SURVEY EXECUTIVE REPORT

- Sexual harassment costs a typical Fortune 500 Service or Manufacturing Company $6.7 million per year - a cost of $282.53 per employee; costs are comprised of turnover, absenteeism, reduced productivity, and using internal complaint mechanisms. Omitted are the costs of litigation, responding to charges filed with municipal/state/federal regulatory agencies, destructive behavior and sabotage. In contrast, meaningful preventive steps can be taken for $200,000 - a cost of $8.41 per employee. It is 34 times more expensive to ignore the problem.

- 25% of responding companies received 6 or more formal complaints of sexual harassment within the past year.

- Most formal complaints are against an individual higher up the corporate ladder: 36% are against one's immediate supervisor; 26% are against a more powerful person; while 32% are against co-workers.

- Few incidents are reported to employers: the formal complaint rate across all companies is 1.4 per thousand women employees per year.

- The highest formal complaint rates were in firms whose workforce is at least 75% men (1.9 per thousand woman employees per year) and in financial services firms (1.6 per thousand women per year).

- The lowest formal complaint rate--0.9 per thousand women employees per year--is in corporations whose workforce is at least 75% women.

- 76% of respondents have written policies specifically prohibiting sexual harassment; an additional 16% include it in their general anti-discrimination policies.

- Commitment from the top makes a difference. When senior management is perceived as making the prevention of sexual harassment a top priority, firms are far more likely to offer training programs and to establish special mechanisms to encourage the reporting of both formal and informal complaints.

METHODOLOGY

In March 1988, a 49-item questionnaire and cover letter from Working Woman's Editor-in-Chief, Anne Mollegen Smith, was sent to the heads of Human Resources of the Fortune 500 Service and Manufacturing Companies. Since Fortune's rankings are not issued until May of each year, the lists were the 500 largest manufacturing and 500 largest service firms of 1987.

The cover letter explained the purpose of this groundbreaking research and assured confidentiality. Surveys were returned to Working Woman, and a postcard was returned to Klein Associates; the postcard indicated that the survey had been returned, allowed respondents to request this Executive Report, and offered participants the opportunity to be interviewed for the Working Woman article. Those who had not returned the postcard were sent a follow-up reminder approximately two weeks after the initial mailing. One hundred sixty completed questionnaires were returned--a response rate of 16%.

Analyses comparing the characteristics of those companies who responded with the total population of Fortune 500 Service and Manufacturing Companies indicated that our sample was not biased in terms of key variables such as type of firm, geographical location, or figures for annual sales/assets/revenues. Random phone calls to non-respondents most often indicated that their lack of participation was due to corporate policy prohibiting releasing information for any survey. Others informed us that aggregate corporate data on sexual harassment are not kept, thus precluding participation.

Responding companies may have devoted more attention to the problem of sexual harassment and may be more likely to have implemented policies, complaint procedures, and training programs. Our data, then, may provide a portrait of the more concerned corporations.

SURVEY RESULTS

CHARACTERISTICS OF RESPONDING COMPANIES

THE COMPANIES

Participants in the survey come almost equally from the two major categories of firms comprising the Fortune 500 lists: Manufacturing (53.5%) and Service (46.5%). Locations of corporate headquarters also reflect the distribution of the total population; our sample includes companies headquartered in 31 states and the District of Columbia. California and New York each have 16 respondents, while 14 are headquartered in each of Illinois and Pennsylvania, Ohio has 13, Texas has 12, and 11 are based in Connecticut.

Responding firms represent a wide range of industries. Categories with five or more survey participants include: diversified financial, utilities, commercial banking, retailing, chemicals, diversified service, insurance, transportation, forest products, conglomerates, food, petroleum refining, building materials, and metals.

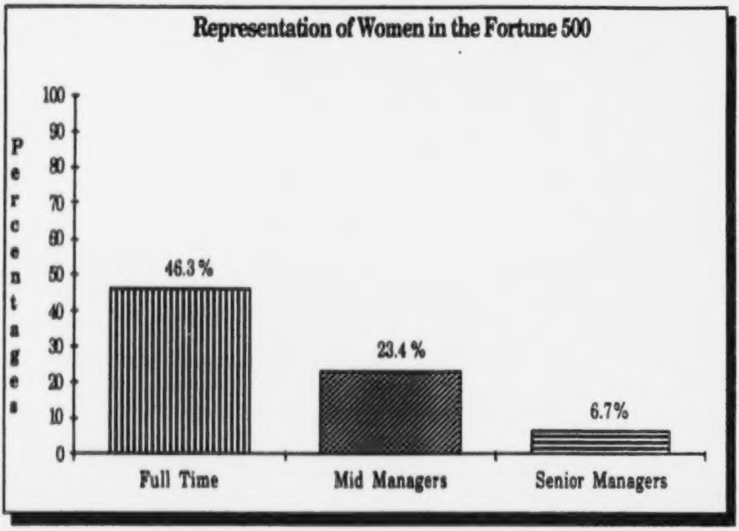
Annual revenues of respondents range from $3 million to $27 billion, with the median being $1.6 billion. Participants have been in business from 2 to 186 years, with the median being 65 years.

Since American business has undergone major restructuring in recent years, companies were asked about their experiences in the past five years. Sixty-three percent had downsized their workforces, 55% had acquired another company, 11% had merged with another firm, and 9% had been acquired.

WORKFORCE

Nearly one-half the firms surveyed are entirely non-union (49%). Another 20% have unions representing between 1% and 25% of their workforce, while 27% of the companies have between 26% and 75% of their employees in unions. Across all respondents, an average of 19% of the workforce are union members.

Although women comprise at least half of the workforce in 43% of responding companies, they are not found at all levels of the firms. As the graph shows, while 46% of full-time employees in the sample are women, only 23% of the mid-managers are women, and just 7% of senior managers are women.



The ages of employees in respondents' workforces accurately reflects the overall distribution of the U.S. labor force:

Under 30 years	34%
30 - 45 years	40
46 years or older	26

Across all respondents, an average of 61% of employees are non-exempt (i.e. eligible for overtime), and the remaining 39% are exempt.

DEFINING THE PROBLEM

Sexual harassment differs in a fundamental way from other workplace problems because defining what constitutes sexual harassment is extremely difficult. In general, the term refers to a wide range of behaviors, from the subtle (sexual teasing, remarks, jokes) to the severe (attempted or actual sexual assault). Other elements aid in arriving at a basic definition:

- verbal or physical behavior of a sexual nature
- unwanted behavior
- deliberate and/or repeated behavior.which causes tangible economic harm or creates a hostile work environment

Yet even these characteristics require interpretation. Sexual harassment is highly subjective--the recipient decides if the behavior is unwanted. Sexual harassment is also context-dependent--a host of other factors help determine the precise boundary between appropriate and inappropriate: the formal and informal power relationship between the parties (including workplace status, age, personal style); cultural, religious and personal background attributes; and whether the offended party feels s/he can object without reprisal.

The survey began with eight vignettes, and asked respondents (typically Vice Presidents of Human Resources) to assess their severity on a five-point scale: Severe Sexual Harassment, Moderate, Subtle, Ambiguous, or Not Sexual Harassment. All of the described behaviors were, in fact, drawn from sexual harassment cases that have been reported in the news. For only one of the eight were participants in virtually unanimous agreement. The following incident was considered to be Severe Sexual Harassment by 97.5% of respondents:

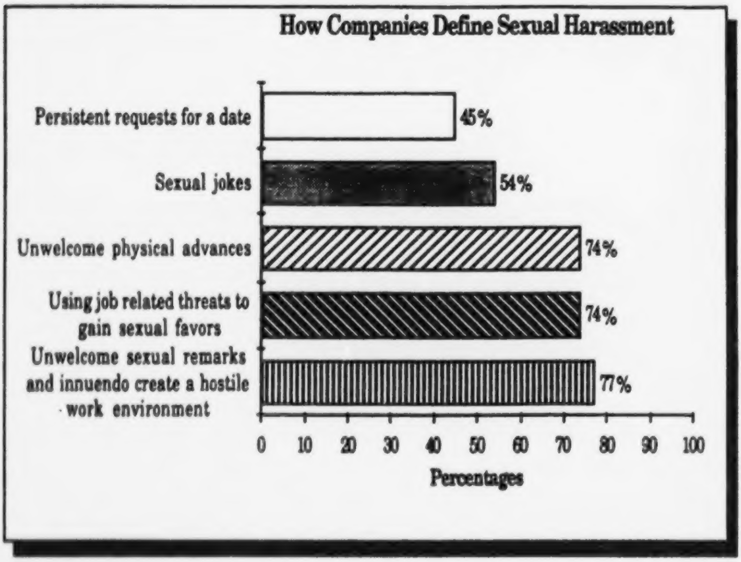
> A manager is having an affair with her boss but wants to break up. He says that she will not get the promotion she's been expecting if she does so.

The greatest diversity of opinions was evoked by this vignette:

> A male supervisor asks a female staff member out on a date. Although she refuses, he continues to ask her.

Twenty-three percent considered this to be Severe, 47% rated it as Moderate, 21% felt it was Subtle, 6% assessed it as Ambiguous, and the remaining 3% indicated it was Not Sexual Harassment.

When asked how their companies define sexual harassment, 96% indicated that they use the EEOC's definition: "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature". However, many companies include other elements in their definition, as well:



Since the sole topic of this survey was sexual harassment, and these respondents are among the most enlightened on the issue, the lack of consensus about defining the problem is an indication of the profound confusion that most employees and managers must feel.

POLICIES

The majority of responding companies have written policies which specifically prohibit sexual harassment (76%); an additional 16% include the topic in other written policies prohibiting discrimination. Four percent describe themselves as having an informal policy, and an additional 4% have policies planned or in draft stages. Less than one percent did not have some type of formal or informal policy and were not planning to develop one.

Policies were enacted as early as 1965, and as recently as this year. The greatest proportion of companies (22%) put their policies in place the same year that the Equal Employment Opportunity Commission issued guidelines on sexual harassment as a form of discrimination (1980). In fact, 66% indicate that the EEOC guidelines prompted them to adopt their policies. Fifty-four percent were motivated by concerns about legal exposure, 17% cited state or local laws, and 14% indicated that employee complaints spurred them into action.

Three-quarters of participants believe that their policy is consistent with their corporate stance against discrimination. Sixty-four percent of respondents believe that having a strong company policy helps prevent sexual harassment from occurring; 90% feel a strong policy encourages employees to come forward with complaints.

Once adopted, policies are often revised; 44% have amended their policies anywhere from one to eight times. An additional 6% are currently doing so. When looking at the dates of the most recent revisions, it is likely that the landmark U.S. Supreme Court decision, Meritor Savings Bank vs. Vinson in June 1986, prompted many of these changes. For those companies who have ever changed their policies, 22% did so in 1986, and 38% reported 1987 as the date of policy changes.

While virtually all companies with written policies have a clear statement prohibiting sexual harassment (91%), they differ as to the other components:

Percent of Companies	Policy Elements
65%	Statement prohibiting sexual harassment by both supervisory and non-supervisory employees
65%	Description of company's grievance procedure concerning sexual harassment
65%	Definition of environmental harassment, i.e. behavior that creates a hostile, intimidating or offensive work environment
56%	Explanation of disciplinary measures that can be taken against harassers
56%	Statement promising confidentiality whenever possible
53%	Definition of quid pro quo harassment, i.e. explicit job-related threats to gain sexual favors
47%	Assurance against retaliation for victims and witnesses
18%	Warning that engaging in sexual harassment could subject the harasser and the company to a lawsuit

COMMUNICATING THE POLICY

Corporations use a variety of methods to communicate their policies. More than half include it in the employee handbook (54%), post it on bulletin boards (51%), and conduct seminars or workshops on the topic (51%). Although 44% include it in orientation materials for all new employees, it is discussed by only 27% of the companies with new managers, and even less often--19%--with all new employees.

THE EXTENT OF SEXUAL HARASSMENT

Across all respondents, the formal complaint rate per 1,000 women employees was a scant 1.4 within the past twelve months. This is undoubtedly an underestimate of the actual rate since some reports include data known only to headquarters, and may omit field offices and plants. Furthermore, the number of actual incidents--as known from previous research conducted by Klein Associates and others--is far greater than the number of complaints. The total number of reported sexual harassment complaints within the past year varied widely:

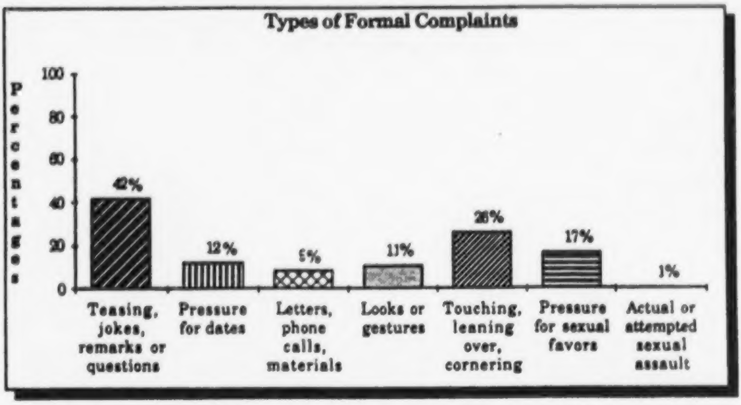
Number of Formal Complaints	Percent of Companies
0	13%
1	14%
2	19%
3	7%
4	12%
5	9%
6 to 10	16%
11 or more	9%

When compared to results from other research, we conclude that most companies are unaware of the vast majority of sexual harassment incidents. In conducting employee attitude surveys for corporations, we often ask employees about their experiences of sexual harassment (and other forms of discrimination), perceptions regarding frequency of occurrence, and how their company responds. This proprietary research indicates an annual rate of at least 15% for female employees and 5% for male employees. Further, those employees who have not suffered sexual harassment, but believe that their corporation tolerates it, are significantly less likely to view company communications as credible, have significantly less confidence in senior management and less organizational commitment. In turn, these views of one's employer lead to lower productivity and higher turnover.

Recent research on the incidence of sexual harassment in the Federal government reveals an even higher rate; 42% of women and 14% of men experienced some form of unwanted sexual attention on the job within the past two years.

The overwhelming majority of reported sexual harassment cases in this survey are from women complaining about unwanted attention from men. Most involve charges against someone with more power: 36% are against the complainant's immediate supervisor, and 26% are against another more powerful individual within the corporate hierarchy. However, nearly one-third involve co-workers.

Complaints of sexual harassment received through formal corporate channels range from the subtle to the severe:



(Note: Totals more than 100% because more than one category could be selected per complaint)

More than half of all complainants are under the age of 30. Harassers and victims tend to come from different age groups:

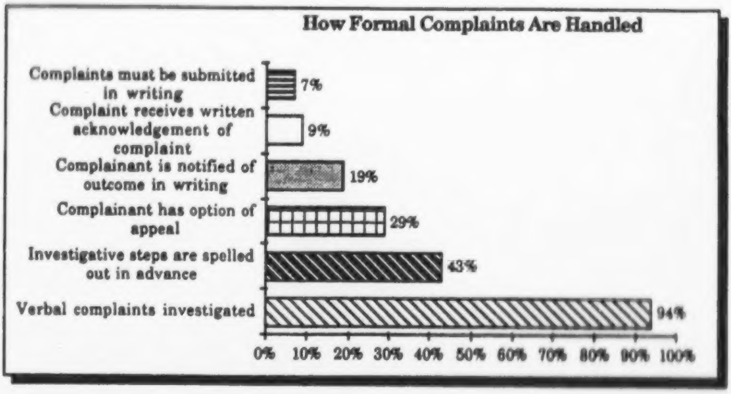
Age group	Accused Harassers	Formal Complainants
Under 30	20.4%	54.2%
30 - 45 years	57.2	41.5
46 years and older	22.4	4.3

Respondents were asked whether or not complaints were usually made by and/or about the same individuals. Although neither category seems widespread, twice as many indications of chronic harassers were given as of chronic complainants: 12.4% believe that most complaints are made *about* the same few people, while 6.1% feel that most complaints are made *by* the same few people.

Sixty-four percent of the companies have never been involved in sexual harassment litigation. However, 17% reported one case, 17% have been in litigation two to five times, and the remaining 2% have been in six to fifteen lawsuits stemming from sexual harassment.

HOW FORMAL COMPLAINTS ARE HANDLED

Sixty-four percent of respondents agree that most formal sexual harassment complaints they receive are valid, 33% neither agree nor disagree, while only 4% disagree. Sixty percent felt that a formal grievance procedure increases the reporting rate of sexual harassment. However, the complaint procedures in place are quite varied. Respondents were asked to indicate their procedure for both formal and informal complaints; multiple responses were possible:

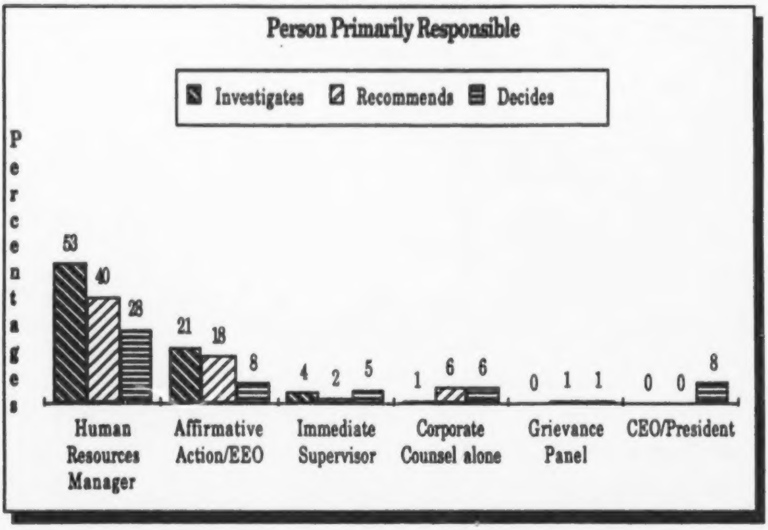


For approximately half of the corporations (52%), an employee can choose between at least two people as their first step in lodging a formal complaint. For the remaining half, the first contact is divided between a Human Resources officer (25%), the complainant's immediate supervisor (12%), and the firm's Affirmative Action/EEO Officer (12%).

Once a complaint is made, 79% of the companies have a formal investigation process.

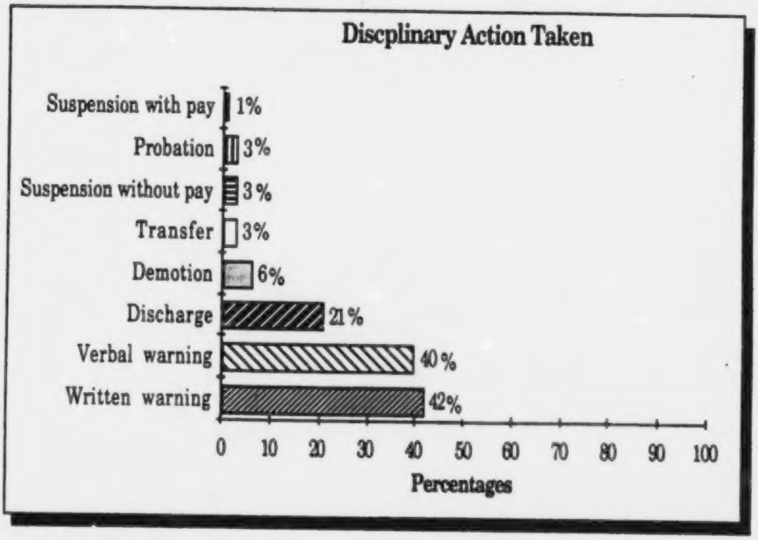
Despite the fact that 56% of corporate policies assure confidentiality whenever possible, only 3% of companies make a practice of never identifying the complainant during the investigation. Thirty-nine percent indicated that they feel they cannot fairly confront the accused without disclosing the complainant's identity. An additional 48% disclose the name only with the person's consent.
A full 84% evaluate their company's complaint process as making employees feel free to discuss minor and major work problems.

Respondents were asked to identify the person *primarily* responsible for investigating complaints, recommending appropriate courses of action, and making the final determination in sexual harassment allegations. Human Resources managers comprise the single largest category at each step; however, it is worth noting that their involvement decreases from phase to phase.



(Other respondents indicated that either the responsibility for investigating, recommending, and deciding the outcome of sexual harassment complaints is shared amongst two or more individuals, or that they were unable to provide this information.)

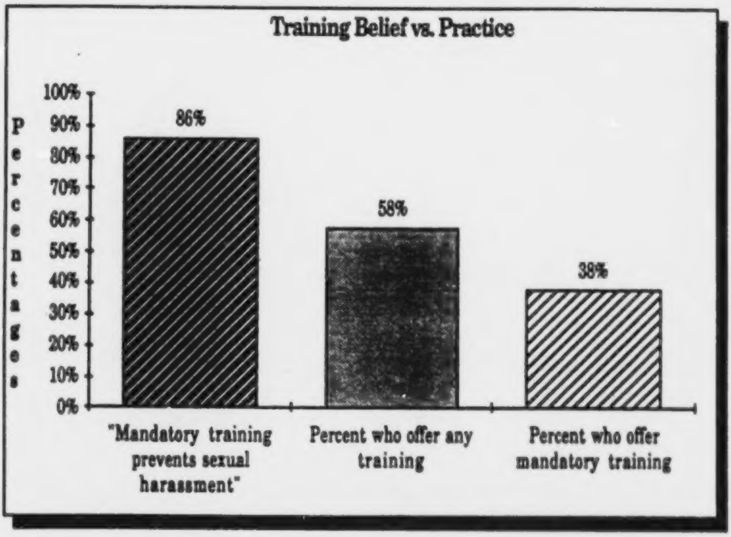
After completing the investigation process, if a company feels that the accused is guilty of sexual harassment, disciplinary action ranges from verbal warnings to termination. (Some respondents chose more than one category per case, therefore the total is greater than 100%.)



Virtually all respondents (96%) agree that disciplining offenders helps prevent sexual harassment.

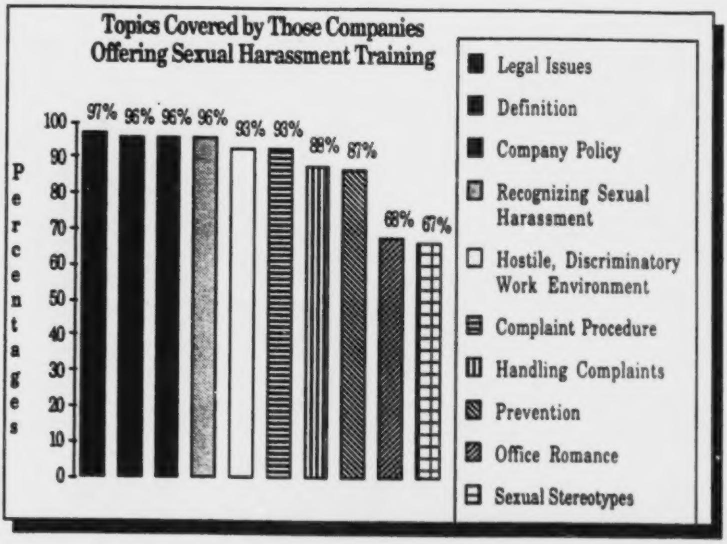
TRAINING

Mandatory training programs are thought to help prevent sexual harassment by 86% of respondents. However, only 58% actually offer special training.



Of those who do, 71% offer it to managers only, while 29% make it available to all employees.

Two-thirds of the firms require attendance at their training programs. Most programs cover the same curricula:



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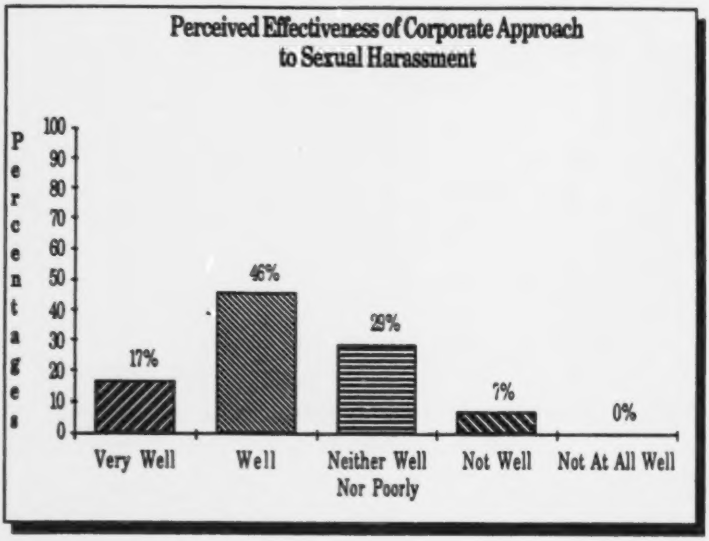
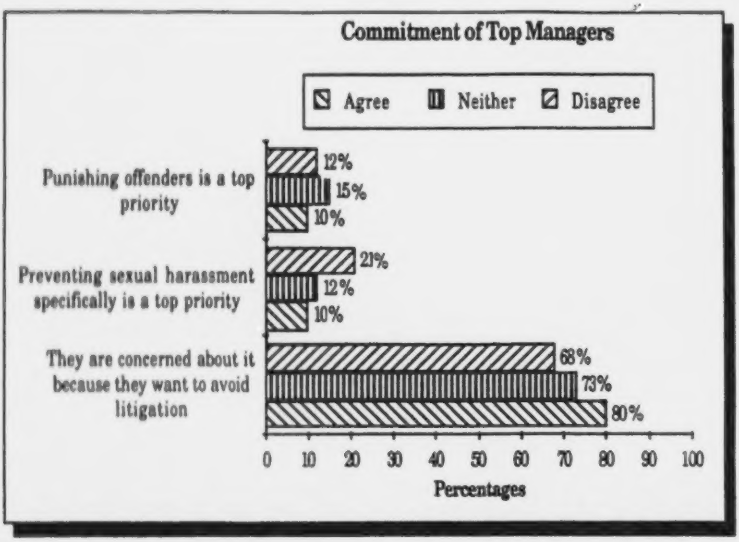
As corporations begin to raise the topic of sexual harassment with their employees, there is an emerging consensus about how it needs to be discussed.

OVERALL APPROACH AND COMPANY COMMITMENT TO DEALING WITH SEXUAL HARASSMENT

When asked to rate the effectiveness of their corporation's overall approach to sexual harassment, most were confident that the approach was working well:



Survey participants were also requested to evaluate the commitment of their top managers to the elimination of sexual harassment.

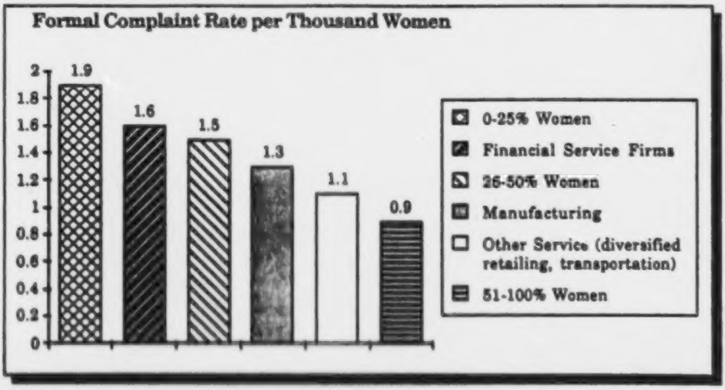


When preventing lawsuits is more important than preventing sexual harassment itself, the company conveys different messages to its employees. Minimizing legal exposure means developing and communicating a policy, and taking swift action once a complaint is made. Prevention entails additional measures--creating awareness throughout the organization, encouraging employees to come forward through a choice of formal and informal channels, and reiterating senior management's commitment on a regular basis.

IMPLICATIONS OF THE SURVEY FINDINGS FOR HUMAN RESOURCES PROFESSIONALS

Sufficient research on the prevalence of sexual harassment has been conducted to conclude that there is a large gap between its actual rate and the number of complaints known by Human Resources professionals. Closing this gap--by increasing the reporting rate and decreasing the actual incidence--should be the goal of all corporate efforts against sexual harassment.

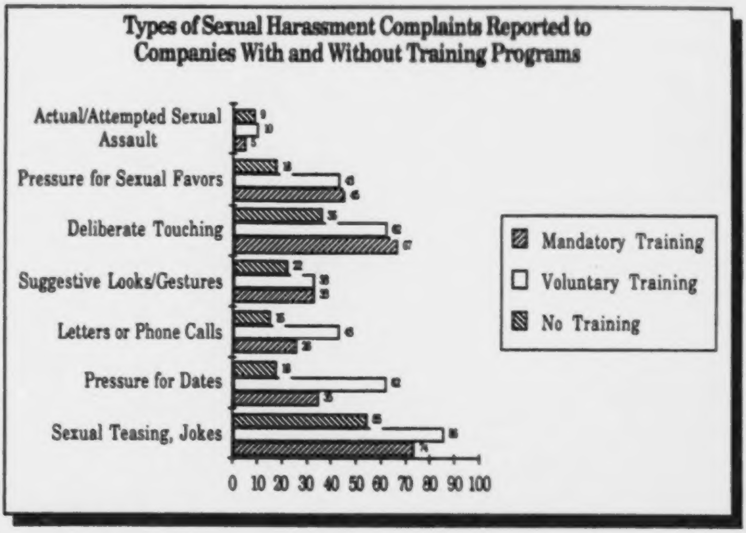
To understand what explains the variation in the complaint rates of different companies in our survey, more sophisticated statistical analyses were performed. Multivariate analyses allow us to look at the independent effects of many variables simultaneously; for example, for these data we are interested in whether or not characteristics of companies and characteristics of workforces make a significant difference in determining high or low complaint rates. In fact, formal complaint rates are significantly higher in those companies whose workforces have the lowest proportion of women and in financial service firms (as opposed to either other service firms or manufacturing firms).



Previous research confirms the importance of the proportion of women on the overall incidence of sexual harassment. In fact, a gender-balanced work group--not just a gender-balanced company--shows significantly lower rates than a group with very few women. However, the relationship between formal complaint rates, actual incidence rates and gender balance in any given organization is complex and involves other organizational characteristics.

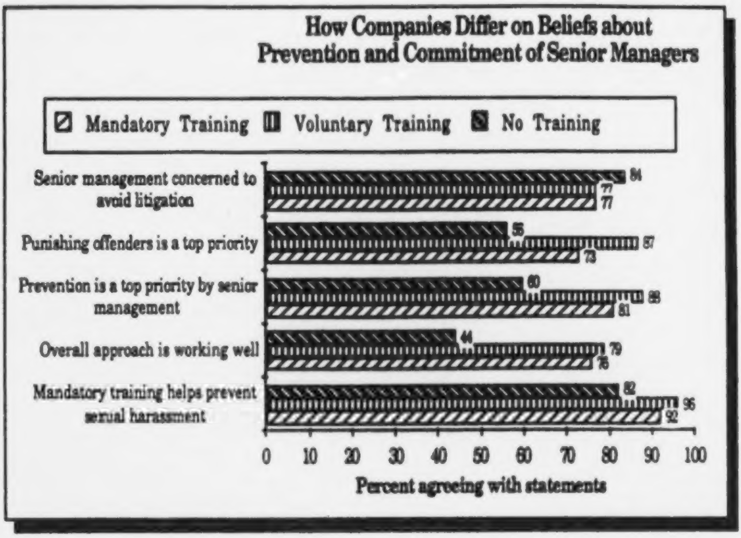
DOES TRAINING MAKE A DIFFERENCE?

Since the survey did not measure complaints of sexual harassment before and after the implementation of training, we cannot definitively state whether training changes reporting or incidence rates. However, those corporations with training programs do hear more complaints--of both subtle and severe forms of sexual harassment--than firms without programs.


Types of Sexual Harassment Complaints Reported to Companies With and Without Training Programs

With the exception of sexual assault, companies with training programs hear higher rates of complaints of all types of sexual harassment. In some instances, companies with voluntary programs hear more than those with mandatory training; this is probably due to mandatory programs being offered most often to managers, while voluntary programs are likely to be open to all employees.

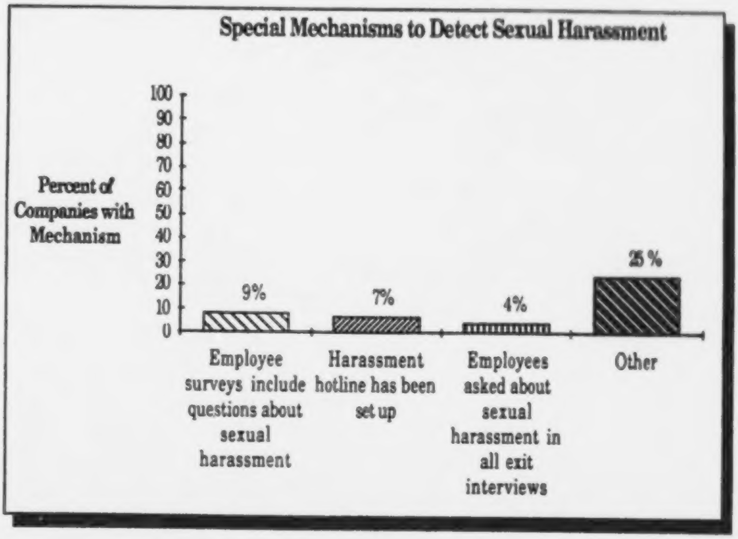
Companies with and without training programs also differ on their beliefs about how sexual harassment is best prevented, and about the commitment of their senior managers.



How Companies Differ on Beliefs about Prevention and Commitment of Senior Managers

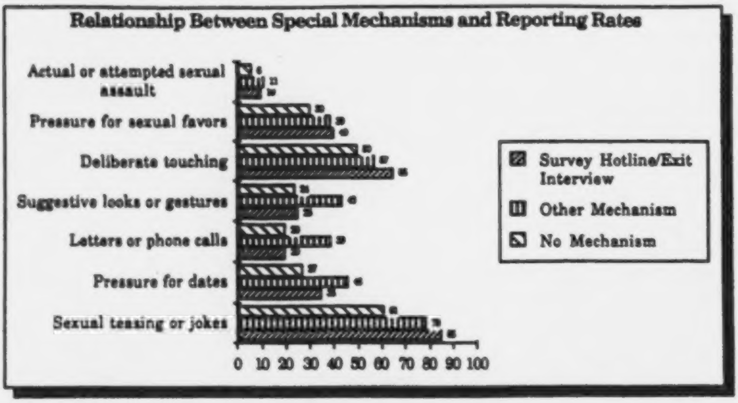
DO SPECIAL MECHANISMS TO DETECT SEXUAL HARASSMENT MAKE A DIFFERENCE?

Less than half of the firms in our sample have put mechanisms in place to help detect sexual harassment:

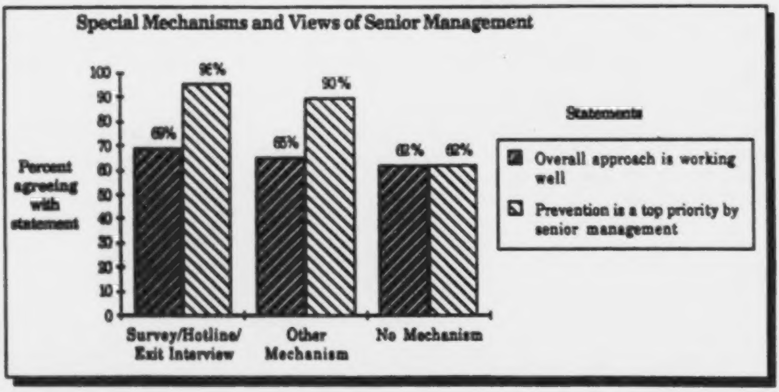


When asked to describe their "other" mechanisms, firms mentioned "Open Door" policies, women's committees, offering a multiplicity of complaint mechanisms outside of the chain of command, anonymous channels for any employee problems, and various forms of awareness training.

Similarly to training, special mechanisms do make a difference in reporting rates:



For all types of sexual harassment, a special detection mechanism seems to encourage complainants to come forward. Their presence also seems to reflect differing views on the part of senior management:



POLICIES AND PRACTICES TO ADDRESS SEXUAL HARASSMENT: WHAT CORPORATIONS NEED

Policies, complaint channels, training programs, sensing mechanisms, and senior management commitment are essential elements of an overall strategy to address sexual harassment. Each need to convey consistent messages:

1) Sexual harassment will not be tolerated - its presence is damaging to all employees and to the organizational climate;

2) Complainants will be protected from reprisal; employees are encouraged to come forward confidentially to discuss situations which make them uncomfortable and to learn about their options;

3) Those found guilty of harassment will be disciplined consistently with others who have violated workplace policies, and without regard to their position or job performance.

THE BENEFITS TO THE CORPORATION

Addressing sexual harassment is significantly more cost effective than allowing it to go on:

> **The cost of sexual harassment for a typical Fortune 500 Service or Manufacturing Company of 23,784 employees is estimated to be $6,719,593 – a cost of $282.53 per employee per year. Omitted are the costs of litigation, responding to charges filed with municipal/state/federal regulatory agencies, destructive behavior and sabotage.**

In contrast, minimal preventive efforts cost $8.41 per employee; it is 34 times more expensive to ignore the problem. (See Appendix A for a full analysis of the financial costs of sexual harassment.)

Benefits of perhaps even greater importance accrue from systematically addressing sexual harassment. Our proprietary research for corporations reveals that:

- Employees who experience sexual harassment are significantly more likely to perceive their corporation as generally discriminatory towards women.
- When an employee feels that their employer tolerates discriminatory practices--whether or not the employee has personally experienced unfavorable treatment--there is a direct deterioration in their views of other aspects of the corporation:
    - substantially lower confidence in senior management in general;
    - reduced job satisfaction;
    - diminished organizational commitment;
    - less favorable view of company communication practices; and
    - significantly increased likelihood that the employee will look for work outside the company within the next year.
- Productivity is significantly lower when employees perceive their organizational climate as discriminatory. For example, in one recent survey of a high tech firm, productivity was 10% lower for those strongly agreeing that men in the company often made sexual comments to women which were intended as putdowns compared to those who strongly disagreed that this behavior was prevalent.

As we look toward the year 2000, about three-fifths of the new labor force entrants will be women. Minorities and immigrants will also comprise large proportions of new entrants. Any corporation that does not learn how to manage a diverse workforce, and how to create a climate which values employee differences in background and perspective will be at a distinct disadvantage.

CONCLUSIONS

As with all surveys, these data raise further questions. There are two areas of discrepant findings that merit comment here. The first relates to the gap between the findings of this survey and those of others; the second concerns gaps within the data itself.

The gap between this survey and those of others stems from an accurate understanding of the meaning of complaint rates. The data in this survey are **formal complaint rates, not actual incidence rates.** All surveys to date show a much higher incidence rate--employees perceiving that they have been subjected to sexual harassment--than complaint rate. Other research also informs us that few employees (usually 1% to 5%) avail themselves of formal complaint mechanisms. Experienced practitioners (corporate ombudsman, Affirmative Action officers, Human Resources managers) echo this theme--they estimate that only about 1% of harassees choose to file a formal complaint. Employees do, however, avail themselves of informal paths whenever possible.

Even though incidents are underreported, the assumption is that formal complaint rates represent the proverbial tip of the iceberg, and that they proportionally reflect actual incidence rates. In other words, workplace characteristics associated with high incidence rates are also associated with high formal complaint rates. For example, this study's finding that complaint rates are lowest in firms with a workforce that is at least one-half female is supported by other research.

The relationship between a company's actual incidence, formal complaint rate, and gender balance is, however, complex. Theoretically, organizations which are both most, and least, sensitive to handling sexual harassment would each have formal complaint rates of 0. In companies that have created an environment where employees feel empowered to ask that objectionable behavior cease, these employees will be able to handle sexual harassment themselves, knowing that their organization supports them. In contrast, corporations who do not take sexual harassment seriously will also have formal complaint rates of 0, since employees will not feel safe coming forward.

The second set of concerns deal with gaps within the data of this survey, particularly between respondents' beliefs and companies' actual practices. These gaps include:

- When asked to evaluate the effectiveness of their company's complaint process, 84% of respondents believe that the process makes employees feel free to discuss minor and major problems at work. This level of confidence is not, however, supported by the actual complaint rate.

- Although 86% of Human Resources managers agree that mandatory training helps to prevent sexual harassment, only 38% of companies have implemented such programs.

- Although assurances of confidentiality are given in 56% of corporate policy statements, in fact, only 3% ensure confidentiality during the investigation of complaints.

The goals of corporate efforts against sexual harassment are threefold:

- **to reduce the gap between the actual incidence of sexual harassment and the rate of employee complaints (including both formal and informal);**
- **to close the gap between the beliefs of Human Resources professionals and the practices of their corporations; and,**
- **to create organizational climates which prohibit all forms of discrimination, including sexual harassment.**

ESTIMATING THE COST OF SEXUAL HARASSMENT TO THE *FORTUNE 500* SERVICE AND MANUFACTURING FIRMS

Freada Klein, Ph.D.
Mary P. Rowe, Ph.D.

ESTIMATING THE COST OF SEXUAL HARASSMENT TO THE FORTUNE 500 SERVICE AND MANUFACTURING FIRMS

by Freada Klein, Ph.D. and Mary Rowe, Ph.D.[*]

The analyses of financial costs presented here reflects our best estimate in 1988. The assumptions are based on our combined experience--totalling 28 years--in assisting individuals and workplaces to effectively address sexual harassment, and on available research. We have relied on research findings from many sources, including proprietary studies conducted by one or both of us for corporations.

We invite practitioners to compare the assumptions here to their own caseloads, and to send us information that could improve the accuracy of this model. Please write to us at Klein Associates, Inc., One Cambridge Center, Cambridge, MA 02142.

Background assumptions about the Fortune 500:

- The total number of employees of the Fortune 500 (the top 500 manufacturing firms & the top 500 service firms) is approximately 23,784,000
- 46% of employees overall are women; however women constitute only 23% of the mid-managers and a scant 7% of senior managers
- On average, a company in the Fortune 500 Service or Manufacturing employs 23,784 people:

Women:	Men:
10,941 overall	12,843 overall
33 senior managers	443 senior managers
1,627 mid-managers	2,654 mid-managers
9,281 non-managers	9,746 non-managers

- 2% of employees in each company (476) are senior managers
- 18% of employees in each company (4,281) are mid-managers
- 80% of employees in each company (19,099) are not managers--e.g., first-line supervisors, foremen, exempt individual contributors, and non-exempts

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- Average annual salaries are:

	Women:	Men:
Senior managers	$100,000	$120,000
Mid-managers	45,000	50,000
Non-managers	20,000	25,000

- Benefits costs run approximately 25% of salary

Background assumptions about sexual harassment in the Fortune 500:

15% of women and 5% of men experience some form of sexual harassment each year; incidence figures run across all levels; this means that 1,641 women and 642 men are harassees, annually, at each company

For women who experience sexual harassment:

5%	just quit (one-fifth leave with severance)	(82)
10%	leave with sexual harassment as part of the reason	(164)
50%	try to ignore it/merely put up with it	(821)
15%	try to handle it themselves	(246)
7%	go to a complaint handler within the company	(115)
13%	go to their manager	(213)

For men who experience sexual harassment:

2%	just quit (5% of these leave with severance)	(12)
5%	leave with sexual harassment as part of the reason	(32)
70%	try to ignore it/merely put up with it	(450)
15%	try to handle it themselves	(96)
5%	go to a complaint handler within the company	(32)
3%	go to their manager	(20)

Turnover

- 5% of women quit solely due to sexual harassment (0 senior managers; 7 mid-managers; 74 non-managers); one-fifth of these leave with $50,000 severance (16 total)
- 2% of men quit solely due to sexual harassment (0 senior managers; 3 mid-managers; 9 non-managers); 5% of these leave with $ 50,000 severance (.6)
- Lyle Spencer (in Calculating Human Resource Costs and Benefits) estimates the cost of turnover of a professional or managerial employee to be 2.4 times the annual salary and benefits (comprised of the costs of exiting, hiring, and learning curve); we have estimated the cost of turnover of non-managerial employees as one-fourth of their average annual salary, including benefits.

COST OF WOMEN JUST QUITTING $ 2,217,000

COST OF MEN JUST QUITTING $ 550,312

- 10% of women quit with sexual harassment as part of their reason (1 senior manager); 15 mid-managers; 149 non-managers); we assume that sexual harassment is one-fourth of their reason for quitting, and therefore accounts for one-fourth of the turnover cost.
- 5% of men quit with sexual harassment as part of their reason (1 senior manager; 8 mid-managers; 23 non-managers); same remaining assumptions as for women

COST OF WOMEN QUITTING DUE IN PART TO SEXUAL HARASSMENT

$ 814,063

COST OF MEN QUITTING DUE IN PART TO SEXUAL HARASSMENT

$ 434,922

In each of the following options--ignoring sexual harassment, handling the problem oneself, using internal complaint handlers, or using one's line of supervision--drops in productivity occur. These include not only difficulty concentrating on one's work assignments, but also the reduced organizational commitment and loyalty which arise when one perceives one's employer as allowing discriminatory practices to go on.

Ignore/Handle Themselves

50% of women try to ignore/put up with sexual harassment; this results in an average productivity drop of 10% for 17.4 weeks (the average duration of sexual harassment as known from other research); (3 senior managers; 74 mid-managers; 744 non-managers)

70% of men try to ignore/put up with sexual harassment; this results in an average productivity drop of 10% for 15 weeks (the average duration of sexual harassment as known from other research); (15 senior managers; 116 mid-managers; 319 non-managers)

COST OF WOMEN TRYING TO IGNORE SEXUAL HARASSMENT (LOST PRODUCTIVITY)

$ 774,216

COST OF MEN TRYING TO IGNORE SEXUAL HARASSMENT (LOST PRODUCTIVITY)

$ 421,199

In each of the options described below--harassees handling it themselves, or availing themselves of internal remedies (complaint handlers or line of supervision)--we assume that some proportion are successful in stopping the sexual harassment.

15% of women try to handle it themselves (1 senior manager; 22 mid-managers; 223 non-managers); for two-thirds, these attempts result in the harassment stopping at less than the average duration; one-third does not stop the harassment--it goes on for the average 17.4 weeks; all result in 10% drop in productivity for the length of the harassment

15% of men try to handle it themselves (3 senior managers; 25 mid-managers; 68 non-managers); for two-thirds, these attempts result in the harassment stopping at less than the average duration; one-third does not stop the harassment--it goes on for the average 15 weeks; all result in 10% drop in productivity for the length of the harassment

COST TO COMPANIES OF WOMEN HANDLING SEXUAL HARASSMENT THEMSELVES

$ 154,760

COST TO COMPANIES OF MEN HANDLING SEXUAL HARASSMENT THEMSELVES

$ 59,675

Obtaining assistance from inside the company

7% of women go to an internal complaint handler (ombuds, affirmative action officer, employee relations, human resources, employee assistance, etc.); (0 senior managers; 10 mid-managers; 104 non-managers)

For half of these women, the harassment is truncated at less than the average duration; for one-quarter, the harassment continues for the full 17.4 weeks; for one-quarter, the complaint involves investigation, fact-finding, and/or mediation. For this latter group, a 10% drop in productivity results for 8.7 weeks, interviews are conducted with 4 peers, 1 manager, and 1 harasser; the complaint is reviewed by 1 senior manager; each of these are two-hour meetings.

5% of men go to an internal complaint handler (ombuds, affirmative action officer, employee relations, human resources, etc.); (1 senior manager; 8 mid-managers; 23 non-managers)

For half these men, the harassment is truncated at less than the average duration; for one-quarter, the harassment continues for the full 15 weeks; for one-quarter, the complaint involves investigation, fact-finding, and/or mediation. For this latter group, a 10% drop in productivity results for 7.5 weeks, interviews are conducted with 4 peers, 1 manager, and 1 harasser; the complaint is reviewed by 1 senior manager; each of these are two-hour meetings.

The total caseload takes 10% of 1 FTE at an annual salary of $75,000.

COST OF SEXUAL HARASSMENT TO THE COMPANY FOR THE PROPORTION OF WOMEN USING INTERNAL COMPLAINT HANDLER

$ 73,620

COST OF SEXUAL HARASSMENT TO THE COMPANY FOR THE PROPORTION OF MEN USING INTERNAL COMPLAINT HANDLER

$ 20,608

13% of women go for assistance to their senior manager (1 senior manager; 19 mid-managers; 193 non-managers). For half, the harassment is truncated at less than the average duration; for one-quarter, the harassment goes the full 17.4 weeks; for one-quarter the situation is investigated, involving the same number of interviews and hours as with the complaint handler.

3% of men go for assistance to their senior manager (1 senior manager; 5 mid-managers; 14 non-managers). For half, the harassment is truncated at less than the average duration; for one-quarter, the harassment goes the full 15 weeks; for one-quarter the situation is investigated, involving the same number of interviews and hours as with the complaint handler.

COST OF SEXUAL HARASSMENT TO THE COMPANY FOR WOMEN USING LINE OF SUPERVISION	**$ 139,851**
COST OF SEXUAL HARASSMENT TO THE COMPANY FOR MEN USING LINE OF SUPERVISION	**$ 13,482**

Use of leave

From other research we know that 25% of harassees use some leave time; we will assume that they each use one-half day per month for three months

COST OF USE OF LEAVE FOR WOMEN	**$ 66,543**
COST OF USE OF LEAVE FOR MEN	**$ 40,146**

Co-worker lost productivity

For each case, 4 peers (same gender as harassee) know about the situation; their time spent discussing the case, offering support or taking sides results in a 2% productivity decline for 8.7 weeks for women and 7.5 weeks for men (one-half the average duration for each gender)

COST OF WOMEN CO-WORKERS' LOST PRODUCTIVITY	**$ 617,522**
COST OF MEN CO-WORKERS' LOST PRODUCTIVITY	**$ 321,174**

TOTAL ANNUAL COST PER COMPANY OF SEXUAL HARASSMENT OF WOMEN:	**$ 4,858,075**
TOTAL ANNUAL COST PER COMPANY OF SEXUAL HARASSMENT OF MEN:	**$ 1,861,518**

TOTAL ANNUAL COST OF SEXUAL HARASSMENT PER COMPANY FOR BOTH MEN AND WOMEN:

$ 6,719,593

Several important categories are omitted from this figure: litigation, responding to charges filed with municipal/state/federal regulatory agencies, and destructive behavior or sabotage. In addition, financial costs borne by employees are also not included (e.g. consulting with attorneys or counselors). Finally, other categories of costs to individuals, corporations and society as a whole are not calculated–the costs of abandoned careers, disrupted personal lives, and disrupted relationships between co-workers.

The cost of sexual harassment is $282.53 per employee per year, for a typical Fortune 500 Service or Manufacturing firm of 23,784 employees. We believe that a corporation of this size could begin meaningful preventive efforts for $200,000 (a cost of $8.41 per employee); this includes: conducting an employee attitude survey assessing both the experience rates and perceptions of discriminatory behaviors, implementing or revising a sexual harassment policy and grievance procedure, developing a customized training program based on survey data, and training internal training staff to implement a program company-wide.

APPENDIX B

WORKING WOMAN

SEXUAL HARASSMENT SURVEY QUESTIONNAIRE

WORKING
WOMAN

SEXUAL HARASSMENT SURVEY

PART I: DEFINING THE PROBLEM

1. Companies haven't always had an easy time defining what does and what doesn't constitute sexual harassment. In 1980 The Equal Employment Opportunity Commision issued guidelines that described it as "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature." Still, what one employee thinks of as normal everyday behavior may be considered sexual harassment by another. The following situations are real-life examples. How would you assess them? (Circle the appropriate number.):

	Severe Sexual Harassment	Moderate	Subtle	Ambiguous	Not Sexual Harassment
a) A male superviser asks a female staff member out on a date. Although she refuses, he continues to ask her.	1	2	3	4	5
b) A manager tells a lot of off-color jokes in an employee's presence. He finds the employee's embarrassment amusing.	1	2	3	4	5
c) A female worker repeatedly is patted on the behind by a male co-worker.	1	2	3	4	5
d) A manager is having an affair with her boss but wants to break up. He says that she will not get the promotion she's been expecting if she does so.	1	2	3	4	5
e) A group of men paste nude photos from Playboy onto biographies of new women employees that the company includes in its newsletter.	1	2	3	4	5
f) At staff meetings, a manager frequently sits next to an employee. He occasionally touches her arm and rubs her neck.	1	2	3	4	5
g) Two men and a woman enter an elevator. The men make comments about the woman's anatomy.	1	2	3	4	5
h) Company administrators show the x-rated movie "Deep Throat" at a company sales meeting after telling employees that they would show an educational film.	1	2	3	4	5

2. Preventing sexual harassment has only recently become the duty of corporate personnel. To help us gauge the most effective strategies for intervention and prevention, please indicate your reaction to the following statements. (Circle the appropriate number.):

	Strongly Agree	Agree	Neither Agree Nor Disagree	Disagree	Strongly Disagree
a) Most complaints of it are valid.	1	2	3	4	5
b) Sexual harassment complaints often arise out of office romances gone sour.	1	2	3	4	5
c) Mandatory training programs help prevent sexual harassment.	1	2	3	4	5
d) Disciplining offenders helps prevent sexual harassment.	1	2	3	4	5

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e) Having a strong company policy against sexual harassment prevents its occurrence.	1	2	3	4	5
f) Having a strong company policy against sexual harassment encourages employees to come forward with complaints.	1	2	3	4	5
g) A formal grievance procedure increases the reporting rate.	1	2	3	4	5

3. Which of the following describes your company's definition of sexual harassment? (Please check all that apply.):

a) _____ We use the 1980 Equal Employment Opportunity Commission guidelines that describe it as "unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature."
b) _____ Using job-related threats to gain sexual favors.
c) _____ Unwelcome physical advances.
d) _____ Unwelcome sexual remarks and innuendo that create a hostile work environment.
e) _____ Persistent requests for a date.
f) _____ Sexual jokes.
g) _____ The company does not specify what constitutes harassment.
h) _____ Other (Please specify): ______________________________

PART II: PREVENTING THE PROBLEM

1. Does your company have a written policy specifically prohibiting sexual harassment?

a) _____ Yes, we have a written policy.
b) _____ We have an informal policy.
c) _____ We have a policy planned or in the draft stages.
d) _____ Sexual harassment is included in another written policy that prohibits discrimination.
e) _____ No, we don't have a policy and don't have one planned.

(If your company doesn't have a policy, skip to Part III.)

2. When was the policy first adopted?

19 __

3. What prompted the company to adopt its policy? (Please check all that apply.):

a) _____ The Equal Employment Opportunity Commission's 1980 issuance of its guidelines on sexual harassment.
b) _____ State or local law.
c) _____ Complaints from employees.
d) _____ Concern about legal exposure.
e) _____ Union bargaining agreement.
f) _____ Consistency with our company's general stance towards discrimination.
g) _____ Other (Please specify): ______________________________

4. Has the policy been revised since it was implemented?

a) _____ Yes, we have revised it. _____times.
b) _____ We are currently revising the policy.
c) _____ No.

5. When was the policy most recently revised?

19 __

6. The following list contains some points found in many sexual harassment policies. Which items does your company include in its policy?

a) _____ A clear statement prohibiting sexual harassment.
b) _____ A statement prohibiting sexual harassment by both supervisory and non-supervisory employees.
c) _____ The definition of quid pro quo harassment, i.e. explicit job-related threats to gain sexual favors.
d) _____ The definition of environmental harassment, i.e. behavior that creates a hostile, intimidating or offensive

work environment.
e) _____ A description of the company's grievance procedure concerning sexual harassment.
f) _____ Assurance against retaliation for victims and witnesses.
g) _____ A clear warning that engaging in sexual harassment could subject the harasser and the company to a lawsuit.
h) _____ An explanation of the disciplinary measures that can be taken against employees who engage in sexual harassment.
i) _____ A statement promising confidentiality whenever possible.

7. How is this policy communicated to employees? (Please check all that apply.):

a) _____ It's included in the employee handbook.
b) _____ It's included in the orientation materials for all new employees.
c) _____ It's discussed periodically in memos or in articles in the company newsletter.
d) _____ It's posted on company bulletin boards.
e) _____ We verbally tell all new employees about the policy.
f) _____ We verbally tell all new management employees about the policy.
g) _____ We conduct seminars and workshops on the subject.
h) _____ Other (Please specify): ______________________

8. Often, sexual harassment is hard to detect because victims are afraid to speak out. Some companies have tried to encourage openness on the subject. What has the company done to detect any problems? (Please check all that apply.):

a) _____ A harassment hotline has been set up.
b) _____ Employees are asked about sexual harassment at all exit interviews.
c) _____ Employee surveys include questions about sexual harassment.
d) _____ Other (Please specify): ______________________

PART III: HOW COMPLAINTS ARE HANDLED

1. Please describe the procedure used for formal or informal sexual harassment complaints. (Please check all that apply.):

a. _____ Verbal complaints are investigated.
b. _____ Complaints must be submitted in writing.
c. _____ Complainant receives written acknowledgment of the complaint.
d. _____ Specific steps of the investigative procedure are spelled out in advance.
e. _____ Complainant is notified in writing of the outcome.
f. _____ Complainant has the option of an appeal process.

2. Under this procedure, who is the first person an employee meets with about a complaint?

a. _____ Immediate supervisor
b. _____ An EEO or Affirmative Action officer
c. _____ Personnel/Human Resources officer
d. _____ Union steward
e. _____ Other (Please specify): ______________________

PART IV. EXTENT OF THE PROBLEM

Sexual harassment complaints can be informal as well as formal. We're interested in any situations you know about.

1. How many complaints of sexual harassment has the company received in the past 12 months? _______

2. Approximately what percentage of these were:
Male to female _____%
Female to male _____%
Male to male _____%
Female to female _____%

3. Approximately what percentage of the accused harassers were aged:
Under 30 _____%
30 - 45 _____%
46 and over _____%

4. Approximately what percentage of the complainants were aged:
Under 30 _____%
30 - 45 _____%
46 and over _____%

5. Approximately how many complaints were made against:
____ Co-workers
____ Immediate supervisor
____ Person with more power
____ Subordinate
____ Customer or client
____ Other (Please specify): ______________________

6. Are most of the complaints about the same few people?

a) _____ Yes.
b) _____ No.
c) _____ Don't know.

7. Are most of the complaints made by the same few people?

a) _____ Yes.
b) _____ No.
c) _____ Don't know

8. Sexual harassment ranges from the subtle to the severe and often involves several types of behavior. Approximately what percentage of the complaints involved:

a) Sexual teasing, jokes, remarks or questions. _____ %
b) Pressure for dates. _____ %
c) Letters, phone calls or materials of a sexual nature. _____ %
d) Sexually suggestive looks or gestures. _____ %
e) Deliberate touching, leaning over, cornering or pinching. _____ %
f) Pressure for sexual favors. _____ %
g) Actual or attempted sexual assault. _____ %

PART V: INVESTIGATION

1. After your company receives a complaint about sexual harassment, do you have a formal investigation process?

a) _____ Yes.
b) _____ Sometimes.
c) _____ No.

2. Who is responsible for the PRIMARY task of investigating, making recommendations and making the final determination in complaints. Please check only ONE person in each of the three categories.

	Investigates	Recommends	Decides
Personnel/Human Resources Manager			
Affirmative Action/ EEO Officer			
Corporate Ombuds			
Corporate Counsel			
Grievance Panel			
CEO or President			
Immediate Supervisor			
Other (Please specify):			

3. Is the employee who voiced the complaint ever identified during the investigation?

a) _____ Yes. We feel we can't fairly confront an employee accused of sexual harassment without disclosing the name of the person who complained.

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b) _____ No. To make sure employees feel comfortable enough to complain, we insure confidentiality.
c) _____ We disclose the name only if that person has given his or her consent.

4. When employees are found guilty of sexual harassment, how many times have the following disciplinary actions been taken?

Verbal warning _____times
Written warning _____times
Transfer _____times
Probation _____times
Suspension with pay _____times
Suspension without pay _____times
Demotion _____times
Discharge _____times
Other (Please specify):_____________________________

5. How many times has the company been involved in litigation concerning sexual harassment?

_____Cases

PART VI: PREVENTING THE PROBLEM

1. Does your company offer a special training program on sexual harassment?

a) _____ Yes.
b) _____ No.

2. Who is it offered to?

a) _____ Managers.
b) _____ All Employees.

3. Is it mandatory or voluntary?

a) _____ Mandatory.
b) _____ Voluntary.

4. Which of the following topics are covered in training? (Please check all that apply.):

a) _____ Definition.
b) _____ Policy.
c) _____ Complaint procedure.
d) _____ Legal issues.
e) _____ Hostile, offensive, discriminatory work environment.
f) _____ Recognizing sexual harassment.
g) _____ Handling complaints.
h) _____ Prevention.
i) _____ Sexual stereotypes/sex roles.
j) _____ Office romance.

PART VII: ASSESSING THE SITUATION

1. In your opinion, are most complainants at your company:

a) _____ Given thorough justice.
b) _____ Given partial relief.
c) _____ Put through the emotional wringer.
d) _____ Ignored.
e) _____ Penalized professionally.

2. In your opinion, are most offenders at your company:

a) _____ Punished too severely.
b) _____ Punished justly.
c) _____ Given token reprimands.
d) _____ Ignored.

3. How would you evaluate the effectiveness of your company's complaint process?

a) _____ It makes employees feel free to discuss minor and major problems at work.
b) _____ It tends to intimidate employees from filing complaints.
c) _____ It tends to encourage overreporting of minor infringements.

4. On a scale of 1 to 5, with 1 representing very well and 5 representing not very well at all, how well do you think your company's approach to sexual harassment is working?

Very Well				Not At All Well
1	2	3	4	5

5. How committed would you say the top management in your company is to the elimination of sexual harassment?

	Strongly Agree	Agree	Neither Agree Nor Disagree	Disagree	Strongly Disagree
a) Preventing sexual harassment specifically is a top priority.	1	2	3	4	5
b) Punishing offenders is a top priority.	1	2	3	4	5
c) They are concerned about it because they want to avoid litigation.	1	2	3	4	5

6. If you could add anything to your company's policy and procedure concerning sexual harassment, what would it be?

____

____

PART VIII: BACKGROUND INFORMATION

Please tell us in general about your company. All answers will be confidential.

1. In what state is your company's headquarters located? ____________________

2. How would you describe your company?
a) _____ Manufacturing Company
b) _____ Service Company

3) What industry is your company in? ____________________

4. What were your company's total annual revenues in the last fiscal year $ ____________________

5. How old is your parent company? ____________________

6. What percentage of your company's employees are:
    Under 30 _____ %
    30 - 45 _____ %
    45 and over _____ %
7. What percentage of the employees are full-time? _____ %
8. What percentage of full-time employees are women? _____ %
9. What percentage of middle managers are women? _____ %
10. What percentage of senior managers are women? _____ %
11. What percentage of employees are
    non-exempt _____ %
    exempt _____ %
12. What percentage of employees are unionized? _____ %
13. The 1980s have been a time of restructuring for American businesses. Which of the following has the company experienced in the last five years? (Please check all that apply.):

a) _____ Merged with another company.
b) _____ Acquired another company.
c) _____ Been acquired by another company.
d) _____ Downsized its workforce.

No survey could possibly cover every aspect of a problem as complex as sexual harassment. If you have other thoughts to share, please include them on a separate sheet of paper and send it along with your completed questionnaire.

Chairman **Ford**. Thank you very much.

At 12 o'clock a memorial service for our former colleague from Massachusetts started in the Hall of Statues at the Capitol, and I informed the members of the committee earlier today that, to enable them to attend the most important part of it, which will be between 12:10 and 1 o'clock, we would recess for that period of time.

I know it is an imposition on the members of the panel, but if you could return at 1 o'clock to answer questions from members of the committee I would appreciate it. I have not seen a more impressive panel in front of this committee ever, and I think our record would be the poorer for not having an opportunity to put your responses to questions in it.

So I will, without objection, announce that committee will stand in recess until 1 o'clock, when we will resume where we are at the moment.

[Recess.]

Mr. **Miller**. The committee will come to order. It is my understanding we are into questions.

Harris, did you have some questions of this panel?

Mr. **Fawell**. Yes.

Mr. **Miller**. Thank you for joining us again.

That's the Republican light. We get five minutes; they get one.

Mr. **Fawell**. Maybe, there are so few of us, we could have six minutes instead of five.

I have had the advantage, Mr. Chairman, of talking to at least two of the witnesses informally, so I am a little bit ahead of where I might otherwise be.

The question that I have, and it follows along with the informal conversation which I had with Ms. Klein and Ms. Ezold—and here is where a number of us are asking for help. We all, I think, on both sides of the aisle, believe that some kind of a special harassment cause of action is called for, especially in such an egregious case, or I would say cases, but certainly Jackie Morris' testimony has to move just anybody.

Those are what we would call in the law as "Oh, my God, egregious." You would prevail on willful and wanton burdens of proof, I think, if the remedy is there.

So it is a case of trying to craft, it seems to me, a kind of a remedy, while we keep in mind that Title VII covers not only sex but race, and religion, and national origin, and now being incorporated by reference is the Disabilities Act, so that all kinds of employment practices which might be deemed discriminatory insofar as employees who have mental problems and/or physical problems will also be potential as a cause of action.

Therefore, as I look at this particular bill, in Section 5, where basically a new cause of action, which I liken to strict liability in tort—and I know, Ms. Ezold, you will know what I mean when I talk about that—I am a bit overawed by that, because it simply says that if in any—that an unlawful employment practice is established if one simply shows that sex, or race, or national origin, or religion, or now disabilities, incorporated by reference, was a contributing factor, even though there are other factors which would have denied liability under the standard Title VII case.

That bothers me immensely. That kind of a cause of action, at least, I could never agree to. Yet I think that there can be methods of crafting one.

Ms. Klein, you had stated, for instance, that there are several areas that one has to look at. And, right now, we have a caucus on the Republican side where we are trying to evaluate how you craft a harassment cause of action which is fair to all parties. You said the real goal and the most important thing is deterring the employer from doing this again, giving real incentive that he stop that kind of conduct.

I would agree with you. A good old monetary award is something that certainly would convince one, lead one in the right direction. There are different types of monetary awards, however, with caps, without caps, and also you can have an administrative procedure where it is a civil penalty which goes to the state, perhaps into a special fund to help battered women, perhaps into a special fund for disadvantaged black youth, things of this sort.

Can you express your feelings, in light of your statement that the most important thing is that we deter the employer? Could you express your views more fully there and also say—and I heard the testimony. I understand Ms. Ezold said, "Hey, I want some personal compensation for what I have gone through, too."

Must there be the personal compensation aspect? She is already going to get all of back pay to which one is entitled. It is a question of whether we go on to mental distress and all the full-blown tort kind of a remedy.

Do you get the drift of my question?

Ms. **Klein**. I think so. Let me make three points: first, I would be opposed to pulling harassment out as a separate remedy. I think we have to look at a lot of reasons, one in particular is that minority women, women of color in the U.S. labor force who experience sexual harassment perpetrated by a white male are generally more likely to report it as race discrimination.

I think for us to impose different remedies on different forms of discrimination is for us to define other people's experiences, and that is a problem.

Mr. **Fawell**. Are you referring to Section 1981, then, the racial discrimination reporting?

Ms. **Klein**. I am referring to your earlier statement about pulling harassment in particular out and crafting a separate remedy for it.

Mr. **Fawell**. No. I would keep it in Title VII, but it would be a special harassment cause of action within Title VII.

Ms. **Klein**. Okay. Then, on your other points, I think that punitive damages without a cap is the way to send the message, not because I think litigation is the answer. As I stated before, I think that those who have done what my other two panelists have done is to make it easier for the rest of us, not for themselves.

Mr. **Fawell**. May I interrupt just on this point? When you say punitive damages is the answer, to a lawyer you are saying, "Well, that means willful and wanton, really egregious conduct only." It is a punishment type of a reward, but you are not talking about, then, compensatory damages; is that correct?

Ms. **Klein**. I am saying punitive damages in addition to compensatory damages, and it is important that punitive damages not be capped.

Jurors will make decisions on an amount of an award that is appropriate to the actions committed and to the resources of the employer. To artificially impose a cap is to ensure that the wealthiest employers will have a rounding error imposed on them that will not motivate a change in behavior.

Jurors are very well able to distinguish what will make this employer not do this again. And revenue data from the firm can easily be presented to the jurors, and jurors make those determinations all the time. I do not think we want to impose an artificial limit there.

I think that the compensatory damages ought to stay in and that those damages need to be available. If I had experienced what either of these two panelists have experienced and took a case only to see the funds go to a battered women's shelter, where am I? Do I have a job? Do I have a career? You haven't provided any incentive for an individual to right their wrongs.

Mr. **Fawell**. Well, one of the other alternatives, of course, if you look at, for instance, the case that we discussed, Price Waterhouse, Ann Hopkins was able to get $435,000 in back wages for the years, and she also shot for and got, by court injunction, a partnership with the Price Waterhouse company, which she felt she was denied.

I understand, Ms. Ezold, that you are in your remedy seeking also the requirement by injunction to be mandatorily—have the defendant enjoined to have you become a partner. Even under current law there are at least some very sufficient and significant kinds of damages and abilities by the court, via injunction, to mandate that one be put back in the firm in a partnership status.

So it is not devoid of righting the wrong, to some significant degree, in terms of money.

Ms. **Klein**. Ann Hopkins was awarded that amount of money because that is what she lost. Jackie Morris was awarded $16,000 because that is what she lost. In some cases, the sums are larger than others. And in neither case are victims compensated for what they went through.

Mr. **Fawell**. So you are saying, then, that although you believe that the most important thing and the real goal is to deter the employer; that you also believe that, over and above all the damages that can be obtained now under Title VII, you nevertheless would have to expand it so that the plaintiff would be able to get compensatory and punitive damages with no caps at all?

Ms. **Klein**. That is correct. And that is not in addition; that is because I believe that is what it will take to change the balance, to motivate employers to put in adequate remedies.

Mr. **Fawell**. May I ask just one additional question, if the Chairman might afford me that added luxury.

Perhaps, Ms. Ezold, you might, as an attorney, be best qualified to answer this question. In Section 5 it states that an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, national origin, and, as I say, now disabilities, was a contributing factor for any employment practice, even though other factors are also contributed to such practice.

That strikes me as strict liability in tort. Section 8 incorporates that, as I read it, for it is uncapped, compensatory and punitive damages. Do you think that that is the kind of a remedy that Congress should authorize, keeping in mind that there will be claims by all of the other protected classes to which I have referred; and, in addition, of course, than all of the other labor statutes, where people suffer discrimination too—strikers, for instance?

I don't know if you handle RB, handicapped people, and so forth and so on. Do you think Congress should go that far?

Ms. **Ezold**. First of all, I have to say I am certainly no expert on this act. I believe I am looking at the section you referred to in front of me. It specifically limits those damages for "injury that is attributable to the unlawful employment practice."

By definition, you have to prove the practice first. Even under Title VII as it is now, there has to be a determinative factor. You don't have to prove that sex discrimination is the one and only reason why the employment action was taken against you; it has to be a determinative factor. I guess I am not in a position right now to split hairs between "contributing" and "determinative," except to say that both of them mean it had to be some factor in the decision.

I think that there ought to be compensation where sexual discrimination or sexual harassment, as the case may be, is punished. Going back to the *Hopkins* case, as Dr. Klein said, she was compensated for a loss. The reason she got $350,000, $400,000, or whatever it was, was nothing more than multiplying the number of years that she had to suffer through the litigation and the appeals of an enormous corporation.

Mr. **Fawell**. I understand that.

Ms. **Ezold**. Eight years times the difference between what she earned and what she would have earned there. So that wasn't a windfall for her.

Whether there ought to be—you raised the question earlier, whether or not you ought to be compensated for sexual discrimination even if it is not the one and only, or maybe the determinative factor, and I am not prepared to answer that. I don't know.

Mr. **Fawell**. This is what the statute does say. It doesn't even say that intent is necessary. It just simply says all you have to do is show that sex was a contributing factor, and, bango, you go for full compensatory, unlimited, and punitive damages in a Federal court under a new two-year tort. It seems to me that that is really a fantastic strict liability tort. There is no defense.

Mr. **Miller**. Will the gentleman yield?

Mr. **Fawell**. Yes.

Mr. **Miller**. Are you suggesting that the employer, the defendant, not be punished for engaging in this activity?

Mr. **Fawell**. No, I am talking about what might be the best crafted kind of a remedy.

Mr. **Miller**. Are you suggesting that you only be made whole, if you will, in a monetary sense and that's it?

Mr. **Fawell**. No, I am specifying this particular cause of action, which is a new cause of action.

Mr. **Miller**. Right.

Mr. **Fawell**. Because it is termed, as I see it, in terms of a strict liability in tort. It simply says that if you show, for instance, that sex is a contributing factor to any employment practice, you have proved your case, even though there were other factors involved. You may have lost your standard case, but all you have to do is show that it was a contributing factor. It might only be a 1 percent contributing factor, but you have proven your case automatically, and you sit and rest, and there is no defense the employer can even put in.

Now that strikes me as the extreme of various kinds of remedies we might be able to craft that would be designed to handle egregious cases such as have been testified to here today. I was trying to elicit the opinion of one of the witnesses as to whether she feels that kind of what I feel is a gross overkill is something that Congress should do, in terms of what is a limited place of employment labor statute.

Ms. **Ezold**. I ask some of the esteemed members of the committee to respond to that simply because I am not conversant in the details of the bill. I don't ever think Congress should respond to the extreme situation, but if this compensation is limited to intentional discrimination, I think that there ought to be compensatory and punitive damages.

You mentioned earlier the possibility of multi-million-dollar lawsuits being brought. I think history has shown us that even in tort cases, in the typical contingent fee type of cases, those awards are far below what anyone normally believes, based on an occasional multi-million-dollar verdict.

You indicated that I am asking for reinstatement and back pay. Forgetting my case for the moment, since it is still pending, the damages are still pending, and I would like not to be specific to my case, but, hypothetically, in a case where a woman sues and she gets back pay, well, that is nothing more than what she should have gotten had the discrimination not occurred.

But what happens from that day forward? Historically, my understanding is that the damages have been very limited, in terms of the period of months or years for which you can get front pay. And then what is left? What do you do about the broken career? What do you do about the impossibility of advancement to the level that person would have attained but for the discrimination? What do you do for the emotional distress, the humiliation, all the rest of it?

Women are not going to bring these cases lightly. They are going to be serious cases. You mentioned that—I believe you support the egregious cases. I think it is the egregious cases that come to trial, because nobody but nobody would bring this kind of case lightly. It is a very, very difficult burden of proof. Once you have proven it in one, how much have you hurt yourself? I mean, what have you really won?

Mr. **Fawell**. Thank you. I have exceeded my time. Thank you, Mr. Chairman.

Chairman **Ford**. It has been a long time since I have been in a courtroom, but I did practice for a while as a plaintiff's lawyer and started, when I had no place else to go, as a defense lawyer in tort cases.

I do remember, even though it has been many years, that you have to keep sorted out in your mind the difference between proving that you have been the victim of someone's negligence or intentional action, and then trying, through the only means that the court has available to it, the imposition of damages, to make some kind of adjustment for what has been proven.

If you read the totality of the language which Ms. Ezold referred to that caused the last exchange with the gentleman from Illinois it first says that punitive damages are only available when the action is a result of malice or reckless or callous indifference to federally-protected rights.

Then, when you get to the setting of compensatory damages, it spells out that it will not include back pay or any interest thereon. "Compensatory and punitive damages and jury trial shall be available only for claims of intentional discrimination." So the major limitation is that you must establish, before you can go to the jury with the question of damages, that it was in fact intentional discrimination.

Now, at the point that you go to a jury, that is what the lawyers argue to the jury. Indeed, there will be a set of instructions before the jury leaves the courtroom, that the lawyers generally agree to. Sometimes they argue vigorously in the presence of the judge in chambers, but not in the presence of the jury, until they get whittled down to instructions that tell the jury exactly what they are permitted under the law to take into account in establishing a remedy through damages.

If indeed the harm that was done as a result of sex discrimination was relatively a small part of it, the jury might be instructed to take that into consideration and consider more clearly the other problems which are not federally-connected rights as being the real cause.

At that point, since the act specifically says that either party shall be entitled to a jury trial, at that point you have an entirely different sort of a procedure going forward. Ordinary common sense tells me that there aren't going to be very many judges that are simply going to say to a jury, "You go out there and pick a number out of the air and give it to this woman, whatever you think will make you feel better."

I never had a judge do that for me when I was a plaintiff's lawyer. There were always restraints and restrictions on how far they could go. Sometimes it is very frustrating. It has always been frustrating, I guess, to plaintiff's lawyers. But I don't get the same sort of fear that there is going to be a runaway group of awards going out there.

I would observe one other thing. I spent 14 years trying to sell something that came to be known generically as plant closing notification legislation. Even though we adopted, over the years, part of that legislation, it became known as ERISA, the pension guarantee law. That was under President Nixon.

Then, under President Reagan, we adopted the displaced worker provisions. We were left with one issue, and that one issue was whether an employer had to give notice when they were going to close down an operation and lay off large numbers of people. I can't remember any period of time in that 14 years when I was not assailed in articles, speeches, and every other approach to the media for advocating something that was going to turn loose the wrath of the lawyers into a plethora of expensive lawsuits.

I wonder whether we did as much as I expected to, because after the first year of experience, when President Reagan finally let that become law without his signature, we discovered there weren't any lawsuits. The one that got everybody excited—when I say there weren't any; there were a handful, perhaps, all over the country in the first year—and they pictured all the courts being jammed with lawsuits about this phenomenon.

What got everybody excited was when Wall Street brokers woke up and discovered that my law didn't just cover people who worked in factories; it covered people who worked in brokerages. And the Wall Street Journal took off on me and said I had hornswoggled somebody by talking about plant closing. It was the Chamber of Commerce that talked about plant closing; nowhere in the legislation would you find that.

My experience that I am trying to give to you with this is that, for 14 years, I had to fight things that were never in the statute, never in any version of the statute. Not even the title was even in the statute that they fought with me over for those 14 years.

And for 14 years I heard exactly the same kind of arguments coming from business that we are going to hear, and we have heard before, as we move this legislation, that it will be overly burdensome on business, it will cost money, and, what is worse, that somebody may have a right that is enforceable in the courts and might have a jury decide what the value of that right that has been taken away from them is, and an employer may, if they are guilty of intentional conduct, may have to pay.

The limitations that are in this bill are tantamount to saying that if you are in an automobile accident you can only collect compensatory damages if the person in the other vehicle intentionally hit you. Now we all know that is not necessary. It could be momentary inadvertence on the part of the other driver that gives rise to a judgment. The jury is free, in those kinds of cases, to decide what it takes to try to recompense this person; a person is going to be physically handicapped for the rest of their life, for example.

One presumes that if you have this very limited right to damages for intentional action that the jury would be permitted—and some of us think that they ought to be permitted—to look at a hypothetical case, such as your own. One of the cases, actually, that the Supreme Court messed up involved an accounting firm partnership for a woman. Our attention was drawn to the discrimination between race cases and gender cases in part by that decision.

There ought to be some consideration of what the permanent impact on the person's career is going to be, because if you hit me with a car, and I am, heaven forbid, a ballet dancer, and I never go back to the ballet again, you are going to pay for it. And if you hit me in my place of employment and ruin my career, it seems to me, if it is an intentional act, that it is just as fair to make you pay for that as well.

Now, I don't think Mr. Fawell really objects to somebody being held financially accountable for intentional acts. I just have confidence that that is not what he meant.

Mr. Hayes.

Mr. HAYES. I will be very brief, Mr. Chairman. I have a couple of questions.

I want to direct one to Dr. Klein and the other one to the attorney for Ms. Morris. They are the kinds of questions that require a pretty direct response.

Dr. Klein, the administration has indicated that it supports expanding Title VII's remedies, but just for sexual harassment. Would that be sufficient, in your opinion, to fill the existing gap in Federal civil rights law?

Ms. KLEIN. No.

Mr. HAYES. All right.

Ms. KLEIN. That was brief. As I mentioned before, I think that there are a couple of reasons not to do that. Discrimination doesn't happen so neatly as to only fall within one category and never spill over to the other categories. It is rare that someone experiences sexual harassment and only sexual harassment and that there isn't some other form of discrimination.

As I mentioned, women of color, minority women in the U.S. labor force, by some accounts, are disproportionately vulnerable to sexual harassment, and the perpetrators can indeed be white men. If a minority woman defines that experience as racism that took a sexual form, I do not think that, after all she has been through, we ought to impose our categories on her and say, "You have this kind of remedy for this piece of what happened to you, but if we call it something else you have a different remedy."

I think it sets a dangerous precedent of pitting disadvantaged groups against each other as well, and I don't think that we want anything that furthers that tension within the workplace.

Mr. HAYES. Thank you very much.

Now the attorney for Ms. Morris, I know you heard that this civil rights bill would primarily benefit lawyers. I would like to ask you to comment on that allegation. Do you agree or disagree?

Mr. MOORE. Thank you, congressman. I appreciate the question, frankly.

Lawyers are being bashed, obviously, because lawyers expect, as the rest of us, to be paid for the services they provide. And it is the plaintiffs' lawyers who are being bashed in this instance, because when they help people obtain the rights they have been denied in the workplace, they are supposed to go someplace else and not insist on being paid.

In fact, there is a business to the profession that requires that we be paid with our brothers and sisters on the other side of the table, that we be paid a profit for our education and our experience, our efforts, that we be allowed to accumulate capital to represent other plaintiffs, that we be a force in the marketplace to help plaintiffs eliminate discrimination.

Plaintiffs can't do this by themselves. Now, Jackie Morris, for all of her guts and determination, needed a lawyer to represent her. She went to several lawyers before she came to my office. She was referred to my office by a lawyer who had 20 years experience in labor law, but he looked at the case and realized that Jackie had been terribly wronged, but there was great risk.

And, indeed, for a $16,000 verdict or judgment from the District Court, who was going to take this kind of a case on a contingent fee basis and represent her for, what, 40 percent of $16,000? You are not going to find a lawyer in St. Louis who will do that.

Now, unlike Congressman Washington, who commented earlier, when we won this case, I asked the district judge if I could look at the books of the defendant's counsel to see how many hours they had in this case, because we were talking about a case of low dollar value, $16,000. They had the biggest firm in St. Louis, the 20th largest firm in the Nation, represent the company in this case.

They put in more than 1,000 hours in this case, and they probably billed at least $150 to $200 an hour. They paid, in defense of this case, far more than this case ever would yield for Jackie Morris, and they did that for a reason. They did not want to capitulate. They did not want to make it easy for Jackie Morris to recover what was due her in this case.

So I did not get a judgment for fees that came anywhere near what defendant's counsel obtained; far less than that, half of my hours. I asked for and got paid for half of the hours that defendant's counsel put in, that we were able to document, and we did not document all of the hours that defendant's counsel put in.

Mr. HAYES. Thank you very much. I recognize that it is difficult for attorneys to be as specific and concise in their responses as it is for me. My time is gone, and I want to respect the Chairman's request to live up to our time factor.

Chairman FORD. Mrs. Lowey.

Mrs. LOWEY. Thank you, Mr. Chairman.

I thank all of you who have testified today. I appreciate your sharing your experiences with us, as painful as they have been.

I have a question for Ms. Ezold. I am particularly interested in your comments in regard to the glass ceiling. I am from Westchester County, New York, and you certainly see women who are hitting their heads against that glass ceiling over and over again, and it doesn't seem to be shattering, even after many, many years.

I want to be sure that we all understand clearly, based on your experience, would you consider the increased remedies under H.R. 1 to be a primary tool available for us to combat the glass ceiling? If so, could you expand upon that and why that is the case?

Ms. EZOLD. They are not a primary tool to compensate or to replace what the glass ceiling has done. In other words, you can't give back to a plaintiff, in many cases, the career that they have lost or the ability to rise further in that career. Congress doesn't have the ability to do that. That is a lasting, permanent damage.

I think what the increased remedies under the bill would do, however, is primarily to act as a deterrent, which, hopefully, would limit that glass ceiling. It is not going to help somebody who has been through it to recover, to be able to rise in their career to the extent they could have but for the discrimination. But, hopefully, it will have an effect on other employers.

Since my case was tried and decided, there has been a great deal of press coverage because it was precedent-setting. One thing I have learned, through a multitude of phone calls and letters from around the country, is that law firms and other employers are reevaluating their evaluation systems, their training programs, the assignments that they are giving to women and other minority associates within the firms, and those practices which have resulted in the glass ceiling, for me and a lot of other women.

So, as far as I am concerned, it is the deterrent value that is so important. There is a lot of concern about lawsuits being filed under the new remedies. I hope there will be more lawsuits filed. I wasn't happy to be the first plaintiff to bring this kind of case. Had other cases been brought before, I don't know that I would have had to. I don't know that I would have hit that glass ceiling.

Laws are going to be effective only to the extent that the parties that they are targeting understand they are going to be enforced. The enforcement comes through lawsuits. I mean, we act in effect as private attorneys general, and I hope that there will be some positive spin-off from my lawsuit. But I also brought the suit for myself, to compensate myself.

So the long answer to your question is, I hope that these remedies will serve as a deterrent.

Mrs. LOWEY. So although there are more and more women entering a wide range of professions and rising up to a certain level, you don't think, just by showing their own expertise and proving their worth, that that ceiling is going to shatter, that the remedies that we intend to place in the legislation certainly play an important role as a deterrent, as a signal, as an assist to those women who have constantly been hitting their heads on that ceiling.

Mr. EZOLD. I have watched women in the law in Philadelphia, many whom I know, go up, up, up, be given substantial assignments, work long hours right along with the male associates, and, all of a sudden, it is out, not because they have been asked to leave, but because it is clear that they are not going to make it.

I think that if Wolf, Block's attorney, who was quoted in the press as saying, "This is a hollow victory. I don't think she'll get much of a remedy," if he had instead said to the law firm, "Whoops, I think she might get a substantial remedy here," maybe there would have been a different outcome to all of this, and maybe the next time some other law firm will say, "I don't think it is worth the cost. I think maybe we ought to do it right this time."

Mrs. LOWEY. Thank you very much.

Mr. MILLER. Just one question. I think this panel has been excellent. Unfortunately, that had to be brought out by your own unfortunate experiences with the system. I just want to express my thanks to you, but also my deep concern here that this argument seems to be driven in part by the notion that somehow the victims are going to make this system so expensive that we really have got to modify their right to restoration, because otherwise business will be too expensive in America.

I just find that argument incredible. The conduct on the part of an employer is so outrageous.

Ms. Klein, in your chart, you differentiate from gender comments to sexual assault. They are all outrageous if we in fact believe your right to be free in your personal well-being from others. To now suggest to people who are trying to recover and to punish that conduct, and hopefully to serve as a deterrent, as you point out, that this now gets too expensive, is outrageous.

That may only be a degree to which people appreciate how profitable it is to conduct themselves in the current system, either by keeping people out of properly compensated jobs, or by intimidating employees to do things that they wouldn't otherwise do.

Maybe we ought to flip this coin over and say that when you defend this kind of conduct by limiting the rights of the victim you had better think about what is going on on the other side, how much more profitable those law partnerships if they don't have to share it with somebody that is just as productive as everybody in the law firm, or how much more profitable if you can intimidate somebody by letters, pressures for dates, phone calls, gestures, touching, cornering, sexual favors, into working another hour, or showing up early, or not taking Saturday off.

In fact this law strikes right at the heart of the profitability of racism and sexism and all of the "isms" that work against individual rights. To have people suggest that now, when victims go through the process of coming forward, that now, they might make it all too expensive, even if they have to jump the hurdles of intentional acts and egregious acts, that is unbelievable. It is just incredible to me that this debate is raging in that fashion, focusing on the cost of this.

American history is replete with examples of where the exploitation of other individuals has been incredibly profitable, and the Congress has stepped in, in one fashion or another. That is why those laws are on the books. If they think it is really too expensive out there, stop the practice. Just stop the practice. Don't wait for your competitor to get sued and then decide, "Well, maybe we'd better let these people in our partnership" or "We ought to treat our employees in some better way—" just stop the practice and you can all save money.

This is just a comment. But this notion that the victims are going to drive up the cost of business. To prevail you have to prove it. You have to prove it. You don't allege it; you prove it, at least to the satisfaction even in the settlement. Somebody says, "Well, I guess we couldn't really defend ourselves, so let's settle it out." You must prevail in the allegations, not just make them, to win this.

Ms. Klein, as you point out, there are a lot of related areas where we see the same thing. I am sure, as the two witnesses have related to us before, that this is not an easy decision. I don't know why an attorney would take these cases.

I mean, God bless you, Michael. When you look at a case, do you say, "Well, here are the limits to what you can recover." It is a very difficult one to enlist people, I would assume.

Ms. KLEIN. May I comment?

Mr. MILLER. Yes.

Ms. KLEIN. There is a document that I referred to in my testimony which is our executive report of the survey of sexual harassment in the Fortune 500 that I would like to ask be incorporated into the testimony. One of the appendices to that study is a cost analysis, if you will, of what sexual harassment, allowing it to go on, costs American business, and that makes it far more expensive than stopping it.

The figures in there for the average Fortune 500 of roughly a little more than 20,000 employees, the cost of allowing sexual harassment to go on, in terms of decreased job satisfaction, decreased productivity, increased turnover, is $282.53 per employee. Whereas, implementing the five elements that I mentioned as effective prevention tools costs $8.41 per employee.

So I think it is currently cheaper to clean it up than to allow it to go on, except we are only occasionally looking at it in rational terms. It is never easy to ask people with power, or with privilege, or with the ability to intimidate others to take responsibility for their actions and to change.

Mr. MILLER. Thank you.

Thank you, Mr. Chairman.

Chairman FORD. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Chairman.

Thank you all for your testimony. I have had a chance to review it, and you both present tragic cases. I am glad you are here, and I deeply appreciate your taking the time to be with us this afternoon.

Jackie—I guess it should be Ms. Morris—I have hardly met you. I apologize for being too informal here. Discuss with me your experience with EEOC. Your testimony doesn't really focus on whether EEOC worked, didn't work. You ended up in court. Can you share with us some insights.

Ms. MORRIS. When the problems started happening, I had been suspended from work for three days, so then is when I contacted the EEOC. She told me to get up there right then, and she wanted to listen to my complaint. So I filed a complaint, and within, I think, 60 to 90 days I had a hearing where the company employees were on one side, and I had some witnesses with me on the other side.

We both voiced our opinions. I told them what was going on. The company spokesman that was there had no idea what was going on. He flew in from Indiana. He had no idea. They told him what they wanted him to hear. And I was informing him of some of the things that were going on, and he couldn't believe it.

So after the EEOC hearing, they told me that I had the right to sue, that there was definitely evidence there. And so that's when I pursued my case and took it beyond that. So, in a way, yes, they did help, because they got me on the right track as to what to do.

Mr. GUNDERSON. Did EEOC come out with any kind of a judgment or ruling in your favor?

Ms. MORRIS. No.

Mr. GUNDERSON. And it took 60 to 90 days?

Ms. MORRIS. Yes.

Mr. GUNDERSON. Before you even had a hearing, from the time of complaint?

Ms. MORRIS. It seems like I went in July of 1986, and my hearing was in December 1986.

Mr. GUNDERSON. Even though the focus of this hearing is on damages today, would you agree that, regardless of what we do or do not do on damages, we have to find a way, in harassment cases in particular, to expedite the EEOC response?

Ms. **Morris**. Yes. It needs to be speeded up a little bit quicker, I think, because I think if women or men have a problem in the workplace, that is where they are supposed to go. And if we have to wait six to seven months for their opinion, then that is defeating the whole purpose, because that is six more months of harassment that we have to take.

Mr. **Gunderson**. Ms. Ezold, by filing a Title VII case, you, at some time, also went to EEOC?

Ms. **Ezold**. That is correct.

Mr. **Gunderson**. Again, reviewing your testimony, unless I missed it, you haven't focused on the experience with EEOC. Could you share that experience with us?

Ms. **Ezold**. My case was also pending with EEOC for just about six months. There was no hearing. There were some informal discussions between EEOC and counsel for both sides, and they just didn't go anywhere. They were nonproductive. What it did, from my point of view, was delay me from getting into court.

A congressman who spoke earlier referred to the cost to the plaintiffs versus the cost to the business. We seem to be concerned about cost to business. You have to focus on the enormous obligations and costs to the plaintiff in a case like this. I mean, the act presently says to a plaintiff, "You must go to EEOC. You must wait as long as it takes to get it out of EEOC, to get a right to sue letter. You then go to Federal court."

I feel I was very fortunate in getting my case in and out of Federal court to a liability verdict in nine months. I still don't have a remedy, but I think this court is acting expeditiously, given the Federal court workload.

But you not only have to wait for the EEOC and wait through the case—eight years for Ann Hopkins in the *Price Waterhouse* case—but you have to give up time to prepare for depositions and undergo depositions, and to talk to witnesses and find witnesses, and then go through the trial.

The enormous financial burden on a plaintiff that a corporation simply doesn't have is overwhelming, and that is another reason why plaintiffs, number one, can't bring the suit, because who can afford to do it; and, number two, don't bring it, because even if you can afford, as I did, to last through the lawsuit, what is on the other end?

It is difficult to find counsel. It is a tribute to Ms. Morris' counsel and to my own that they are willing to take cases like this. I had a very courageous attorney from New York, who was in the very unique position of suing fellow attorneys, which is unusual, in a precedent-setting case.

It is tough to find attorneys to do that. You can get attorney's fees under Title VII, but how long do you wait to get those attorney's fees? In the meantime, if you have, in the case of a defendant like Wolf, Block, a major law firm represented by a major law firm with unlimited associates to do research, you have a very expensive legal bill building unless and until you get a verdict in your favor and then ultimately recover.

Mr. **Gunderson**. Thank you all.

Thank you, Mr. Chairman.

Chairman **Ford**. I want to thank you very much. You have set a very good tone for the consideration of what we are going to offer, if anything, as changes to the Judiciary Committee bill. You have certainly given all of us something to think about. I want to thank each and every one of your for your cooperation with the committee and the committee staff and for taking the time to come here and help us today.

Let's all hope that we can get together and look back at this. I was just sitting here exchanging with counsel the thought that flashed through my mind of how many chest-thumping speeches about victims of crime I have heard out there on the floor, that judges ought to be forced to sit down and talk to the families and to the victims before they sentence people, so that they really can understand what it does to people to be victims of a crime.

The kinds of crimes they are talking about that create victims are not white-collar crimes; they are talking about intentional crime. All we are talking about is not making it criminal but making an intentional tort action here. I will see if the same kinds of people have the same kinds of concerns for the victims of the action that we are focusing on. I doubt that we will hear the speeches coming from the same breast-beaters.

With that, I would like to combine panel three, so that we can finish before the committee has to break at three: Professor Kellis Parker, Columbia Law School of New York, together with Zachary Fasman, of Paul, Hastings, Janofsky and Walker, in Washington, DC; Beverly Hall Burns, of Miller, Canfield, Paddock and Stone, Detroit; Joseph A. Golden, Somers, Schwartz, Silver and Schwartz, Southfield, Michigan; Pamela Hemminger, Gibson, Dunn and Crutcher, Los Angeles, California; and Professor Susan Deller Ross, Georgetown University Law Center.

If you could proceed in the order in which I have called you off, then we will withhold questions until you have all finished. We will start with Professor Parker first.

STATEMENTS OF PROFESSOR KELLIS PARKER, COLUMBIA LAW SCHOOL, NEW YORK, NEW YORK; ZACHARY FASMAN, ESQ., PAUL, HASTINGS, JANOFSKY AND WALKER, WASHINGTON, DC; BEVERLY HALL BURNS, ESQ., MILLER, CANFIELD, PADDOCK AND STONE, DETROIT, MICHIGAN; JOSEPH A. GOLDEN, ESQ., SOMERS, SCHWARTZ, SILVER AND SCHWARTZ, SOUTHFIELD, MICHIGAN; PAMELA HEMMINGER, ESQ., GIBSON, DUNN AND CRUTCHER, LOS ANGELES, CALIFORNIA; PROFESSOR SUSAN DELLER ROSS, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Professor **Parker**. Good afternoon. It is indeed an honor to be here before you today. I have been told that we are running out of time, so I am going to abbreviate my remarks.

I come to you from Kinston, North Carolina, where I attended my first law school at the foot of my grandmother, who did not have a high school degree nor a law degree, but she nonetheless shared with us the songs and stories she had learned as a youngster whose parents had been slaves. She had much to teach us about the rights and rules and remedies that emanated from an African-American community. So I am going to talk about the remedies in quite a different way than we have heard in the discussions so far.

Also, I attended the University of North Carolina, and you all know that the sit-ins started in North Carolina in that year. I spent the next four years walking the streets and singing the songs for civil rights up and down the South. Then I went to Howard University Law School and graduated in 1968, after which I clerked for Judge Spotswood W. Robinson, III. You all know the work that he did in civil rights.

Then I became a law professor, director of the Martin Luther King Program at the University of California at Davis, and began teaching remedies in 1969. In 1972, I joined the faculty at Columbia University Law School to teach remedies, among other courses. In 1975, I authored a book, "Modern Judicial Remedies."

When my good friend, Drew Days, was asked to join the Justice Department, Civil Rights Division, as its head a few years later, I went on leave from the faculty at Columbia to handle his cases at the NAACP Legal Defense Fund and then returned to Columbia to think, teach, and write.

One of the things that I have been writing about is how the history of African-American thought had an impact on remedies and on civil rights. The title of the presentation that I prepared for today, "The Wonderful Tar Baby Story: Civil Rights Remedies and Trial By Jury," is not a joke.

What I am trying to do is to show that inside the heritage of African-Americans, its music, songs, stories, is all the information you need about remedies. Black folks had to deal in a world in which the law said that they had no remedies: no contract remedies, and yet they made contracts; slaves could not marry, by law, and yet they married; slaves could not be taught to read and write, and yet they learned to read and write.

So I thought that if we started by looking at the folks who were in an extreme position of being remedy-less and look at how they coped, we would understand why it is that remedies are needed for Title VII today.

We have spent a lot of time talking about tort remedies and contract remedies and whether or not we are turning this civil rights legislation into a tort law. Well, if I look at civil rights law from the perspective of the slaves and then move it on up, the first thing I notice is civil disability. The tort law is working to keep slaves in their position as slaves. The tort law is working after slavery. We had then the tort law, and the contract law, Jim Crow laws to keep black folks in a position of civil disability.

Indeed, if the tort system and the contract system and the private law system had worked, there would not have been a need for public law to provide remedies. What I would like to do is to show how the tort law worked for others and did not work for those people who are the historic victims of racial discrimination, sexual discrimination, and so on.

You see, back in the days of slavery, when the Supreme Court said that black folks had no rights white people should respect, the Court was talking not only about rights but also about remedies.

What the Court meant was that black folks could not be expected to go into court to sue, say, for breach of contract and to get a remedy.

Indeed, I remember when I entered law school, looking through law books to see if I could ever find a plaintiff who was black, who had filed a product liability action. What I found was a book in which the author talked about the fear black folks had of litigation.

And I remembered a story my grandmother told me about Old Sister Goose who was swimming in the lake, and Old Brother Fox who was hiding in the weeds, and how Old Brother Fox jumped out there and said, "I got you now Sister Goose!" And she said, "Hold on there, Brother Fox. Let's take this matter to court." And when they got to court, all the judges and the lawyers and the people in the audience were foxes. And Sister Goose lost. Now, when my grandmother taught me that story, she said, "So you see, colored children. When you go to that courthouse, you're going to lose."

And that's why, given all the civil rights statutes we have, all the remedies we've talked about: from Section 1981, where you can get compensatory and punitive damages; to Section 1982, where you can get compensatory and punitive damages; to Section 1983, where you can get compensatory and punitive damages; to Section 1985, where you can get compensatory and punitive damages; to Title VIII where you can get compensatory and punitive damages.

With all those laws, you don't find a proliferation of litigation from the victims of discrimination—not from the black folks, not from the women, not from anybody. People who are victims of discrimination would rather switch than fight. We leave the neighborhood. We leave the job. And we've got to stop doing that.

The hope of this legislation is that people will begin to fight rather than switch. There's a lot that I want to tell you about the litigation, but I'll simply say that on the private side we've had a movement from contract, private-type torts to more public torts—less and less burdens of proof on plaintiffs.

And on the public side in civil rights remedies, we've had more and more burdens of proof placed on plaintiffs, less and less access to remedies. When you look from Section 1983, the 14th Amendment litigation, all the way across the board you find that—and you put that litigation—juxtapose that litigation with tort litigation, or contract litigation for that matter, you find that people are saying contract law is looking more and more like torts.

The leading book in the 1970s was a book called The Death of Contracts. And the people in torts are saying, "Wow, we've got something called enterprise liability here." And you're moving on and on with burdens of proof.

But what you're talking about are people who are the beneficiaries of discrimination who are recovering those remedies. On the other hand, when you look at civil rights remedies, what you find is a court that discovered that the Achilles heel of civil rights was remedies.

And so from 1971, when the court decided you could no longer get an injunction to enjoin a state court in a criminal proceeding, until now, the Supreme Court has found that yes, indeed, that Achilles heel is very, very weak. And thus, *Patterson*; and thus, the need for this legislation.

Thank you.

[The prepared statement of Professor Kellis Parker follows:]

THE WONDERFUL TAR BABY STORY: CIVIL RIGHTS REMEDIES AND TRIAL BY JURY

Kellis E. Parker
Professor of Law
Columbia University

The Wonderful Tar Baby story, a folktale conceived by African American slaves, teaches important lessons about remedies. In that story, Brother Rabbit refused to join the sisters and brothers in an agreement to dig a well and thereby did not gain any rights to use the well. After the well was dug, Brother Rabbit immediately began to take buckets of water for storage at his house. Having failed to catch Brother Rabbit in other ways, the sisters and brothers constructed a person-sized being from turpentine and tar and sat it near the well. That evening, Brother Rabbit returned to the well. When the tar baby refused to speak to him, Brother Rabbit hit it with his paws, then his head, becoming more glued to the tar with each blow. The sisters and brothers convened a trial at which they considered the punishment that would be appropriate. But each time one of them suggested a form of punishment, Brother Rabbit pretended that he could accept punishment in the recommended way but could not accept punishment by being thrown in the briar patch. Hearing this, they decided to dispense the remedy he feared most. They threw him into the briar patch. "I was born and bred in the briar patch," Brother Rabbit sang as he scampered home.

If we consider punishment to be a remedy, then the proposed but rejected forms of punishment remain hypothetical remedies. Yet rather than determine which remedy is an appropriate response to Brother Rabbit's wrong, the animals focused on the undesired effects of the hypothetical remedies (Brother Rabbit did not seem to be bothered by those remedies) and applied a remedy that would counteract the undesired effects of hypothetical remedies. A remedy that counteracts another remedy will be called antiremedy. By inducing his accusers to devise an antiremedy to respond to a series of hypothetical remedies, the original problem was left without a remedy. Brother Rabbit remained free to take the water at his pleasure.

Remedies for employment discrimination are hypothetical in many instances and inadequate in others. In Patterson v. McLean Credit Union, ___ U.S. ___ (1989), the Supreme Court held that section 1981 did not apply to racial harassment in the workplace because such conduct occurred after the formation of the contract. The Court observed that "the most obvious feature" of section 1981 was its focus on the making and enforcement of contracts and not on their performance. Thus, for the employee victim of harassment who remains on the job, the expected protection from discrimination remains hypothetical. The harassing employer is therefore as immune from remedy as was Brother Rabbit. But the Patterson case does not simply reduce the victim's claim to a mere hypothetical remedy, it also extends to the employer an effective antiremedy. The workplace becomes the employer's briar patch, a zone within which he may engage in racial harassment without fear of a federal remedy.

The hypothetical remedy has long been a barrier to the protection of victims of historic forms of discrimination. Until the Supreme Court decided Brown v. Board of Education in 1954 the Fourteenth Amendment's promise of equal protection of the laws remained hypothetical. Yet, even after the Brown decision, federal civil rights laws were necessary to move the promise of civil rights remedies from the hypothetical to the actual. Title VII, the Equal Pay Act, the Age Discrimination in Employment Act, and the Fair Housing Act, when added to the Reconstruction Civil Rights Acts provide comprehensive remedies for discrimination on the basis of race, gender, age, religion, and national origin. Yet, the Patterson case demonstrates that these statutory remedies are not sufficiently capable of protecting victims of discrimination from hypothetical remedies and antiremedies.

Employment discrimination remedies are similar to the Wonderful Tar Baby story in yet another way. Recall that a tar baby was constructed to entrap Brother Rabbit. Although the gender and age of tar baby remain unknown, we do know that the tar baby was used by both Brother Rabbit's accusers and by Brother Rabbit in ways that were not beneficial to the tar baby. Accordingly the tar baby represents the historic victims of remedy-antiremedy struggles. In the allocation of civil rights remedies, victims of racial discrimination apparently have access to a broader remedy agenda than the victims of discrimination based on gender, religion and national origin. While these categories are found within racial minority groups, the idea that racial discrimination is a tar baby classification within which all forms of discrimination will find protection is untenable.

The effort therefore to amend Title VII is driven by the compelling need to eliminate the hypothetical remedies, the antiremedies, and the tar babies created by extant employment discrimination laws. This comment will focus on the proposals to restructure the statute's remedy agenda. A proposed alternative to the Civil Rights Act of 1990 includes a section 8, entitled "Providing for Additional Equitable Relief in Certain Cases of Intentional Discrimination." Under this section, the court may, "in the exercise of its equitable discretion," order the defendant to pay an amount not exceeding $150,000 if the court finds that such a payment "is needed to deter the respondent from engaging in such unlawful employment practices," and "is otherwise justified by the equities, is consistent with the purposes of this Title, and is in the public interest." The section further specifies that "all issues in cases arising under this title shall be heard and determined by a judge. . .; provided, however, that if the court determines that one or more of the claims presented may require relief, and if the court holds that a jury trial with respect to issues of liability is constitutionally required on claims for such relief, then a jury may be empaneled to hear and determine such liability issues and no others."

As we have seen from our discussion of the Wonderful Tar Baby story, a goal of a remedy is to avoid the functions performed by hypothetical remedies. A hypothetical remedy is a mere mirage in the desert, appearing to promise adequate solutions when in fact it remains unresponsive. Such a remedy can be identified by the application of a test adapted from the Uniform Commercial Code (U.C.C.). According to section 2-719 of the U.C.C., a remedy which purports to be exclusive must not fail to perform its "essential purpose." A remedy which falls short of the mark in this way is merely hypothetical and therefore should not be applied. Thus, a question that should be asked is whether the proposed remedy agenda for Title VII presents hypothetical remedies.

Another question that should be asked is whether the proposed remedy agenda presents antiremedies. In the school desegregation decisions of 1954, the Supreme Court's order that the public schools be desegregated "with all due deliberate speed" extended to the states an antiremedy in the form of widespread dilatory compliance that counteracted the effects of the desegregation remedy. Pollution cases such as the celebrated case of Boomer v. Atlantic Cement Co., 26 N.Y. 2d 219 (1970), provide a window through which we are able to observe the functions of manifest antiremedies. In that case, a permanent injunction ordering the plant to relocate from the residential environs remained hypothetical because it was conditioned on the defendant's compliance with an order to pay damages to the plaintiff for future harm. From this perspective, it appears that the plaintiff received a remedy. But the defendant also received a remedy in the form of a forced sale of the plaintiff's property right to the use and enjoyment of his land. Because the purpose of this forced sale was to counteract the effects of the hypothetical relocation order, it qualifies as antiremedy.

Remedy is positive rather than negative, optimistic rather than pessimistic, and constructive rather than destructive. Indeed, the word "remedy" derives from the Latin "re" which means again and "mederi" which means to heal. Literally, remedy means to heal again or to return to good health. Remedies may have a placebo effect and therefore cause a social healing to flow from the idea that a cure is imminent. When, however, remedies induce a belief that a healing has or will occur and, in fact, the particular intervention fails to respond to the problem, such remedies are hypothetical. Still, the negative, pessimistic, destructive and deceptive ideas are the opposite of remedy. They are antiremedies.

Considering the discussion above and the proposals for the amendment of Title VII, two concerns should be raised. The first concern focuses on whether the proposed revision of Title VII violates the Seventh Amendment. If it does, the remedies prescribed therein will remain hypothetical. The second concern targets the proposed cap on damages. Will a ceiling on damages generate antiremedies?

The right to trial by jury is guaranteed by the Seventh Amendment "in suits at common law, where the value in controversy shall exceed twenty dollars." In such suits, "the right of trial by jury shall be preserved." The Supreme Court has applied a historical test, a judicial discretion test, an analogical test, and a nature of the remedy test in determining whether the Seventh Amendment should be invoked. On its face, the proposed amendment seems to contemplate the application of a nature of the remedy test. A jury trial is not compelled by the Seventh

Amendment if the remedy is "equitable," but it is required if the remedy is "at law".

Distinctions between legal and equitable remedies are not always easy to make. In order to facilitate the decision as to whether the proposals are legal or equitable, we should consider the structural functions of remedies. The substantive functions of remedies address the question of the goals of the remedies (what do remedies purport to do). The structural functions of remedies focus on how remedies do what they do. It is the structural functions that facilitate the determination of whether remedies are legal or equitable.

Remedies perform the declaratory function by making a statement about the rights and obligations of the parties. While all remedies at least perform the declaratory function, some remedies merely perform that function. The damage remedy and the declaratory judgment merely perform the declaratory function. The damage remedy, for example, declares that A owes B a sum of money.

Remedies also perform a command function. Such remedies order an individual or a group to perform or not to perform specified acts. Thus, injunctions perform the command function. Merely stating that the damage remedy performs the declaratory function while the injunction performs the command function is not sufficient, however. An ancient maxim insisted that "equity acts in personam and law acts in rem." Yet when one considers the fact that both the damage remedy and the injunction are in personam in the sense that jurisdiction over the person is required, one realizes that the maxim probes more deeply into the distinctions between the two types of remedies. The maxim's essence is revealed by identifying another function, the promissory function of remedies.

Remedy declarations create expectations of benefits and burdens from future performance much the way that promises do. These promissory declarations broadcast that compliance with the remedy will benefit and burden the parties in identifiable ways. They also broadcast that the failure to comply will give the prevailing party access to the courts for additional relief. It is this additional relief that distinguishes equitable remedies from legal remedies. Noncompliance with equitable remedies is enforced in personam with the contempt sanction being available while noncompliance with legal remedies is enforced in rem against the adverse party's property.

The question of whether a remedy is equitable or legal is determined by how the remedy performs the structural functions identified above rather than by what label the legislature attaches to the remedy. The maxim that equity follows substance rather than form expresses the concern with the nature and functions of the remdy rather than the label.

In the proposed amendment, the remedy described as equitable is one that requires the payment of money. Courts rarely consider orders that concern the payment of money to be equitable remedies. One exception is an order for backpay under Title VII. While backpay might be considered to be incidental to equitable relief and therefore the Seventh Amendment would not be invoked, the courts are wrong when they hold that the restitutionary nature of the backpay award renders it equitable. Restitutionary money remedies such as the quantum counts in Anglo American jurisprudence were born in the common law courts and were considered remedies at law. The equitable restitutionary remedies target a res in which the court might attach a constructive trust or an equitable lien. Backpay appears to be analogous to a restitutionary remedy that was legal in nature rather than equitable. It is clear that the remedies in the proposed amendment are not restitutionary in either the legal or the equitable sense.

Since the Seventh Amendment would be applied to invalidate the proposed remedy, that remedy would be hypothetical. But it has yet another flaw. The remedy purports to cap damages at $150,000. Case law on caps also reveal that this issue raises substantial questions about constitutionality. The problem is that the cap seriously undermines the jury's traditional role of determining the severity of the injury through the assessment of damages.

See, Boyd v. Bulala, 877 F. 2d 1191 (4th Cir. 1989). The test that is to be applied here is one of whether the action is analogous to a private or a public action.

Traditionally, the courts have been available to enforce contracts and to award remedies for injuries arising from torts. The employment discrimination actions are analogous to these private interest cases in contract and torts. What they announce is the idea that the common law remedies that inadequately responded to historic forms of discrimination are being supplemented by remedies that are defined by statute. But rather than announce purely public interest remedies measured by the gravity of the defendant's conduct or by the nature of the public interest at stake, the courts in employment discrimination cases focus their gaze on the scope of the harm inflicted on the complainant. The money remedies granted in such an enterprise are in the nature of compensatory damages therefore and are clearly legal in nature. Beyond the problem of the Seventh Amendment is the danger that a statutory amount might be set so low that the private bar would not find it in their interest to champion the claimant's cause in which case the courts would not get the chance to dispense any kind of remedy. Another problem is that the low amount stated might cover only a fraction of the harm suffered by the claimant. In such a case, the claimant would be in a position in which the defendant would have obtained an antiremedy that is far more valuable than the claimant's remedy.

Chairman **Ford**. Mr. Fasman.

Mr. **Fasman**. Mr. Chairman, members of the committee, my name is Zachary Fasman. I'm a partner in the firm of Paul, Hastings, Janofsky & Walker. I have practiced labor and employment law for the past 20 years, much of that concentrating in the field of employment discrimination law. In addition to my day-to-day practice, I've chaired the Litigation Procedures Subcommittee of the American Bar Association's Equal Employment Law Committee.

I've authored several books advising employers how to comply with the Nation's civil rights laws, including a forthcoming volume on how to comply with the Americans With Disabilities Act. I believe strongly in the goal of equal opportunity and that belief is shared by the National Association of Manufacturers and the Society for Human Resource Management on whose behalf I am testifying today.

The National Association of Manufacturers has a long history of support for the equal employment laws. NAM initially supported Plans for Progress in the 1960s, which of course was the precursor for our affirmative action policies, and in the 1980s has, again, strongly supported affirmative action and ensured its continuation as part of our nation's employment policies.

SHRM, which formerly was known as the American Society for Personnel Administration, has had a long history as well in this field in teaching human resources personnel how to comply with the laws. SHRM, too, has taken great pains to fight for the equal employment laws. And its landmark amicus brief in the case of *Johnson* v. *Transportation* was cited repeatedly by the court, by Justice Brennan, as a justification for affirmative action.

Both of these organizations are committed to strong and effective enforcement of our civil rights laws. We are not anti-civil rights in any way. We believe that employment discrimination is a pernicious practice and it must be eradicated. But we do not believe that H.R. 1 is the appropriate way to do this.

This bill's attempt to enhance remedies will encourage litigation, rather than promote equal employment. And we urge the committee to consider carefully whether the path to equal employment lies through the courthouse door.

We've submitted some fairly extensive comments about this legislation, and they are before the committee. I'd like to spend just a few moments trying to explain why we believe that compensatory and punitive damages and jury trials should not be available under Title VII of the Civil Rights Act of 1964.

Title VII emphasizes administrative conciliation and prompt resolution of employment discrimination complaints. The charges must be filed quickly, investigated promptly by the EEOC, and the statute mandates conciliation prior to suit. Congress made litigation, when it passed Title VII, a last resort, to be pursued only where prompt compromise would not solve the problem.

The remedies that Congress chose to make available under Title VII are a key element of this overall plan. Title VII provides complete relief for the concrete economic harm suffered by victims of employment discrimination. Courts can order back pay; they can order front pay; they can order a person reinstated to a job; they can order a person to be promoted to a job or hired into a job; and they can restore lost benefits.

But, as the committee knows, and the reason we're here I suspect, compensatory and punitive damages and jury trials are not available under Title VII. By changing this, as H.R. 1 proposes to do, the new law would destroy the incentives that both employers and employees have in the early stages of a case to settle their cases.

What are those incentives? Consider a normal employment discrimination complaint, perhaps where you have an individual who claims that he was improperly discharged. Early in the process when a charge is filed before the EEOC, as presently structured, even full relief for that person—the lost wages that he or she has suffered—is relatively slight in comparison to the employer's projected litigation costs.

The employer, on an economic basis, has a strong incentive to settle that matter, to provide that full relief, and to move on. A plaintiff also, at that point, has a strong incentive to settle, particularly if he or she knows that full economic relief is what lies at the end of the road. And full relief can be, as I say, provided for those concrete economic injuries.

Moreover, employers who find a problem early in the process and who resolve it in this fashion have a strong incentive to correct the impropriety that caused the problem: society benefits; barriers to discrimination are eliminated; and litigation is avoided. And in fact, as I'm sure the committee knows, the vast majority of cases that are filed before the EEOC are either administratively closed or settled prior to litigation.

But all of this changes if large damage awards and jury trials become the rule in Title VII cases. Plaintiffs are not going to settle, even for full economic relief, if they believe they can obtain a six-figure jury verdict award based on mental anguish and punitive damages.

And once settlement demands outstrip the employer's projected cost of litigation, an employer that believes that it can prevail in litigation will be inclined to litigate and not to settle. It has no economic incentive to settle at that point. And thus, both sides under this system would have an incentive to litigate rather than to resolve a complaint.

The current system which emphasizes settlement stands in marked contrast to the situation that's transpired under states that allow wrongful discharge litigation, in which the availability of compensatory and punitive damages and jury trials has significantly multiplied the amount of litigation without solving the underlying problem.

States in which tort remedies are available in employment cases, of which the most apparent is California but certainly not the only example, have found six-figure remedies common. And court congestion is the inevitable result.

The problem as we see it, in a nutshell, is the tort law is simply not a solution for the difficult societal problem of employment discrimination. If tort law offered such a solution, we would not have a medical malpractice insurance crisis; we would have far fewer civil cases in the courts; and we would not have Federal and state legislatures seeking alternatives to tort law in the very areas in which tort law was born.

We don't say that Title VII's remedial scheme is perfect. There are areas such as sexual harassment law where victims do not suffer economic harm; and therefore, economic relief under Title VII as presently constituted may be inadequate.

But our view is that Title VII's overall plan works quite well. The statute has been enormously successful. We do not believe the discrete laws in the statute are sufficient justification for altering the cornerstone of the action and for changing its entire remedial structure.

We believe that the path to equal employment does not lie through court delays and increased litigation. We believe instead that equal employment opportunity depends on creating a system of incentives that makes litigation a last resort while providing full relief for the economic harm suffered by victims of unfair practices. And we believe that Title VII's remedial scheme as currently structured provides just those incentives.

Thank you.

[The prepared statement of Zachary Fasman follows:]

SOCIETY FOR
HUMAN
RESOURCE
MANAGEMENT

NAM
National Association
of Manufacturers

H.R. 1

THE CIVIL RIGHTS ACT OF 1991

TESTIMONY ON BEHALF OF

NATIONAL ASSOCIATION OF MANUFACTURERS

AND

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES

FEBRUARY 27, 1991

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Mr. Chairman, members of the Committee, my name is Zachary D. Fasman. I am a partner in the law firm of Paul, Hastings, Janofsky & Walker. I am submitting this testimony on behalf of the National Association of Manufacturers ("NAM") and the Society for Human Resource Management ("SHRM") (formerly the American Society for Personnel Administration).

The National Association of Manufacturers is a voluntary business association of more than 12,500 member companies and subsidiaries, large and small, located in every state. Members range in size from very large corporations to more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 percent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

The Society for Human Resource Management is the world's largest association of human resource professionals with over 44,000 members employed by businesses which employ more than 53 million people throughout the world. As the leading professional association for human resource managers, SHRM has a vital interest in legislation impacting on almost every aspect of the human resource function.

Both SHRM and NAM have a long background in promoting fair employment practices. In the 1960's, for example, NAM was instrumental in promoting Plans for Progress, the forerunner of our affirmative action policies. Its efforts continued through the 1980's, when NAM took the lead in establishing the consensus that preserved the policy of affirmative action as a component of our nation's employment structure.

SHRM's efforts in this area are equally long-standing. SHRM has played a vital role in training the human resources profession to understand and implement the nation's equal employment laws as they have been passed. In the 1980's SHRM's activities included the preparation and filing of an amicus curiae brief before the Supreme Court in the landmark affirmative action case of Johnson v. Transportation Agency, 480 U.S. 616 (1987), arguing that affirmative action was a necessary part of our employment system. SHRM's brief was cited by Justice Brennan as providing the professional justification for affirmative action. Thus, these two leading organizations bring a long and involved background to the current debate over our equal employment policies.

Our position before the Committee today, as it was last year when we testified on the Civil Rights Act of 1990, is not against civil rights. We support strong and effective enforcement of our civil rights law. Our position is that the bill under consideration is an unbalanced attempt to rewrite the nation's equal employment laws that ultimately will lead to more litigation and less equal employment. The Civil Rights Act of 1991 ostensibly seeks to overturn several recent Supreme Court decisions that have made it more difficult for plaintiffs to prevail in federal employment discrimination litigation. In fact, however, the bill would effect a profound change in employment discrimination litigation at the federal level, and goes far beyond overturning a few Supreme Court rulings.

We believe that the following changes proposed by the bill are the most significant and unwise:

1. Compensatory and punitive damages, and jury trials, would be available under Title VII. Title VII is a carefully crafted statute, designed to emphasize administrative conciliation and resolution of equal employment complaints short of trial. A key element of the statute is its remedial structure. Title VII claims are not tried to juries, and equitable remedies of reinstatement and back pay, as opposed to legal remedies of compensatory and punitive damages, are available. The vast expansion of employment-at-will litigation in many states has been fueled by the availability of compensatory and punitive damages, and jury trials. A similar result can be expected if this

bill is enacted. Moreover, these enhanced remedies would extend not only to Title VII claims, but to actions under the Americans with Disabilities Act ("ADA"), a new and undefined statute where employer duties and responsibilities are far from clear, and where employers legitimately unable to determine their obligations could be forced to pay large compensatory and punitive damage awards.

2. Employers seeking to justify practices that have an adverse impact upon minorities or women would have to prove, by demonstrable evidence, that the practices "bear a significant relationship to successful job performance" or "bear a significant relationship to a significant business objective of the employer." Under current law, an employer must justify an employment practice that tends to screen out more minorities or women by showing that the practice has a manifest relationship to the employment in question. This standard, originally set forth in the Supreme Court's landmark decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), has governed the employment arena for many years. Although H.R. 1 purports to overturn the Supreme Court ruling in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), and return the law to the Griggs standard, it uses new terminology never before seen in the employment law field. The new definitions proposed in the bill would themselves generate litigation, increase the employer's

burden of proof unduly, call into question an employer's ability to base its employment standards upon important work-related standards (such as workplace safety), and cast doubt upon an employer's ability to demand the best qualified workers.

3. Plaintiffs would be allowed to attack employer actions at any time that race, color, religion, sex, or national origin was a "contributing factor" in an employment practice, even though the employer would have taken the same action in any event. Title VII seeks to remedy unlawful employment practices, not punish illegal thoughts. There is no benefit, apart from increased litigation, for allowing the federal courts to consider cases premised solely upon an allegation of impure thoughts, devoid of any practical significance.

4. The changes proposed by the bill would be applied retroactively, and final judgments rendered during the past two years would be vacated even though the cases are no longer pending. We question both the wisdom and the congressional authority for reopening cases that already have been concluded, and for making substantive changes in the laws retroactive.

5. Title VII's statute of limitations would be extended to 2 years. A charge of discrimination now must be filed with the Equal Employment Opportunity Commission

within 180 days from the date that the alleged unlawful act occurs. Under this bill, a plaintiff would have 2 years from the date the act occurred, or from the time that he or she was "affected adversely" by an employer action. This substantial and unjustified extension of the statute of limitations in all Title VII cases would bring even more cases into court.

These are not our sole concerns about the bill, but simply are the most important areas in which the bill would lead to an increase in litigation. Our extended analysis of these concerns is set forth below.

DETAILED ANALYSIS

1. Expansion of Remedies in Employment Discrimination Cases. Section 8 of the bill provides for compensatory and punitive damages and jury trial under both Title VII and the ADA in all cases other than those involving "disparate impact." While the caption of Section 8 states that such expanded remedies would be available only in cases of "intentional discrimination," the language of Section 8 clearly makes such remedies available in every Title VII and ADA case in which disparate or unequal treatment is alleged. Because the vast bulk of employment discrimination actions arise under the disparate treatment theory, this section of the bill would make compensatory and punitive damages, and

jury trials, the norm rather than the exception under the statute.[1]

The change in remedies under Title VII reflects a basic shift in the governing philosophy under the statute, and will lead to increased litigation rather than enhanced equal employment. Title VII was carefully crafted to provide a complete and expeditious remedy for the economic harms suffered by victims of employment discrimination. Discrimination charges must be filed promptly; the EEOC is supposed to investigate expeditiously; and if reasonable cause exists to believe that the statute has been violated, the Commission must attempt to conciliate the matter prior to suit. The obvious and stated intent of Congress was to avoid extensive court delays and quickly remedy employment discrimination through administrative conciliation.

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[1] Contrary to popular belief, these additional remedies and jury trials would be applicable to class actions. There is no question that disparate treatment class actions have been and continue to be brought in the federal courts. See generally Schlei & Grossman, Employment Discrimination Law, (BNA, 2d Ed. 1983), at 1322-24, and Cumulative Supplement (BNA 1989), at 485-88. Because the expanded remedies contained in Section 8 would apply to all claims that do not rest upon the disparate impact theory of discrimination, class actions premised upon the disparate treatment theory would be tried to juries and remedies available would include compensatory and punitive damages. Indeed, because the disparate impact and disparate treatment theories often can be applied to the same set of facts, passage of the bill would lead to the demise of disparate impact class actions, because plaintiffs plainly would seek to benefit from the vastly expanded remedies available under the disparate treatment theory under Section 8.

This process depends upon maintaining the traditional "economic harm" employment remedy of reinstatement and back pay, and excluding jury trials. At present, early in the process, even full recompense for an employee's economic injury is relatively slight in comparison to an employer's projected litigation costs, to say nothing of the plaintiff's legal fees that the employer will incur in the event of a loss. While some cases involve matters of principle and do not settle, many if not most charges are resolved early in the process because an employer has a strong incentive to settle rather than litigate. Such settlements often provide significant non-economic benefits for charging parties in addition to economic relief; an employment record from which a termination has been expunged, or favorable references for future employers. This system allows a charging party full recovery for the concrete economic losses suffered through unlawful employment decisions, and provides a strong incentive for both sides to resolve the problem quickly and out of court.

Under the current system, therefore, all parties have a vested interest in prompt resolution of the problem. Society benefits because problems do not fester in the courts, the economic injuries suffered by victims of discrimination are redressed fully, and barriers to minority and female employment can be removed quickly in many cases.

An employer's economic incentive to settle largely is destroyed if compensatory and punitive damages are routinely available. Experience in state wrongful discharge litigation reveals that compensatory and punitive damage awards regularly average in the hundreds of thousands of dollars. Six figure liability automatically will increase settlement costs in most individual cases beyond the employer's projected litigation costs, thus creating a strong economic incentive for employer's to litigate rather than settle. Similarly, there is no reason for an employee to settle at the administrative level, even for full economic relief, if he or she stands a chance of a six or seven figure "mental anguish" jury verdict. By expanding remedies in this fashion, Congress would create a marked incentive for litigation as opposed to expeditious administrative resolution of employment discrimination complaints.

Tort law has little to recommend it as a substitute for Title VII's current structure. Our tort system, which truly may have spawned the phrase justice delayed is justice denied, is renowned for its unfairness and glacial pace. It is ironic that Congress now is considering a tort system in employment discrimination cases, at the same time that legislators on both the federal and state levels actively are seeking alternatives to the tort system itself, especially in areas such as products liability litigation. This irony is even more pronounced given the dramatic and growing overload in the federal courts, evidenced by studies such as the April, 1990 Report of the Federal Courts Study Commission, which concluded that the "recent surge in federal criminal trials . . . is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is a rapidly growing backlog" (at 6). The Study Commission recommended a five-year program in which individual employment discrimination cases would be referred to arbitration by the Equal Employment Opportunity Commission and removed from the federal trial docket, a far cry from the push towards federal litigation embodied in H.R. 1.

This proposed increase in litigation has been justified in many ways by the bill's proponents. Some argue that current Title VII remedies are inadequate and need wholesale supplementation. We disagree.

Title VII's remedial structure certainly is not unique. Congress repeatedly has concluded that employment principally is an economic relationship, and that employment injuries thus should have economic remedies. Virtually every federal statute addressed specifically to the employment relationship -- the National Labor Relations Act, the Occupational Safety and Health Act and ERISA are just a few -- provides relief for economic injuries alone, and none allows for pain and suffering or punitive damages. The multi-million dollar Title VII class actions that have resulted in redesign of so many employment practices arose under the current remedial structure. Indeed, the very groups now decrying the inadequacy of Title VII's remedial scheme quite correctly hailed the statute's extraordinary success on the statute's twenty-fifth birthday, in 1989.

Other proponents of this change argue that compensatory and punitive damages and jury trials already are available to blacks under the Civil Rights Act of 1866, and that the new law merely seeks to preserve parity between groups by making such remedies available to all victims of employment discrimination. Surely this argument begs the question of whether it makes good practical sense to extend tort remedies any further. The Civil Rights Act of 1866 initially was extended to employment discrimination by a Supreme Court decision in 1976, more than a century after its passage, and there is no evidence that Congress (either in 1866 or subsequently) ever has debated the wisdom or effect of applying the statute to the workplace. The argument that all groups must be equal, and all must share in the most extensive remedies available to any, simply proves too much.[2]

We are not suggesting, of course, that our employment discrimination laws are perfect. We recognize that in some instances -- such as sexual harassment cases where no economic injury has occurred -- Title VII provides no economic reward for the victims of discrimination. We also are aware of several congressional proposals to alter these very provisions of Title VII, and offer an expanded remedy to victims of such discrimination. While we do not wish to comment upon any of these proposals in any detail in today's testimony, we would observe that they address a

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2/ Some proponents of this bill have argued that an increase in litigation will not occur, based largely upon a study conducted by the Washington law firm of Shea & Gardner. This study purportedly shows that remedies in employment cases under Section 1981 have not been extensive, and therefore concludes that allowing compensatory and punitive damages under Title VII and the ADA will not have a significant impact. If this is so, one wonders why this provision is so important to proponents of the legislation, or why they claim that such a small increase in verdicts will attract so many plaintiffs' lawyers to discrimination cases. More critically, this study is dramatically flawed. It merely tracks reported Section 1981 decisions during the past ten years, which cover only 2% of the Section 1981 universe. (The study reports upon some 500 cases, out of a 25,000 case universe.) Second, the study does not address many of the most important Section 1981 cases. For example, a recent Section 1981 case in California resulted in a jury award of $12,000,000 in compensatory and punitive damages to a single individual in a race discrimination case, yet this case never was included in the study. We believe that such a study plainly is flawed and unreliable, and that the true measure of the effect of passage of this bill is provided by state law experience with employment litigation.

specific remedial problem without altering the entire Title VII remedial scheme. Surely if Congress were to find that Title VII's remedies in one area are lacking, it has the authority to alter that area. We see such limited problems as insufficient justification for completely rewriting a statute that has worked well for the last quarter of a century.

Of equal importance, the standards established for imposition of damages are unclear at best. For example, Section 8 of the bill provides that punitive damages are available if an employer "engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others . . . ." A "reckless or callous indifference" standard invites federal juries to fashion new, broad criteria for the award of punitive damages, relieved from any requirement that an employer must act with malice or intent to justify imposition of punitive damages. The availability of damages for pain and suffering is a similar invitation for juries to award large verdicts based upon perceived "unfairness" of employer conduct, and threatens to create a new class of experts who will attempt to quantify psychic injuries in the workplace. These are recipes for litigation, not equal employment.

Finally, these problems take on even greater importance when extension of these remedies to the recent Americans with Disabilities Act is contemplated. Indeed, during the debates on the ADA, this very issue was addressed in detail. Following long negotiations between the White House and the Senate, during which organizations such as NAM and SHRM and representatives of the disability community participated actively, the Senate specifically rejected the inclusion of compensatory and punitive damages and jury trials under the ADA.

This conclusion not only was correct then, but is even more clearly appropriate given the lack of clarity in the ADA itself. That act is marked by a succession of undefined terms -- such as undue hardship, undue burden, reasonable accommodation and readily achievable -- that can acquire substance only by regulation and ultimately by litigation. Because the obligations of businesses under the ADA are unlikely to be defined clearly for several years, making compensatory and punitive damages available under the law threatens to impose huge liabilities upon employers desirous of complying with the Act but unable to choose between equally plausible interpretations of unclear terms. Such an imposition of liability, apparently premised upon notions of "parity" for all disabled groups, simply cannot be justified given the lack of clarity of employer obligations under the ADA.

2. Redefining "business necessity". An appropriate definition of "business necessity" is central to this legislation. An unduly strict definition of business necessity would lead employers to abandon merit-related selection criteria, because the standards for their justification would be too stringent.

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court established that if a plaintiff can prove that an employment practice has a disparate or screening impact on the employment opportunities of minorities, the employer must justify the practice by proving that the selection practice has a manifest relationship to the employment in question. In Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), the Supreme Court explained that in cases involving subjective employment criteria, that are not susceptible to objective justification under social science standards, an employer can justify its practice by producing evidence that the challenged practice "serves, in a significant way, the legitimate goals of the employer." The Court concluded that unless subjective employment practices can be justified under this type of standard, employers will be faced with enormous pressure to balance their workforces (through numerical or quota hiring) in order to avoid a violation of the law.

Section 3 of this bill states that it is intended to overturn this aspect of the Atonio holding and to restore the standards initially enunciated by the Court in Griggs. But the complex language used in the bill stands in marked contrast to the simplicity of the Griggs formulation, which has been applied by the federal courts during the twenty years since Griggs was decided. Section 3(o) of the bill distinguishes between employment practices involving "selection" and other employment practices, creating two different business necessity standards. There is no need for two business necessity standards; the Court's decision in Griggs created only one standard. Two standards will lead to uncertainty and increased litigation, especially concerning what definition applies in any given case.

For example, do all discharges fall within the clause for "selection practices" (paragraph (1)(A)) or do some fall under paragraph (1)(B)? Although the language of paragraph (1)(A) appears to cover "retention," not all discharges can be justified on "performance" grounds. Common reasons for discharges are found in disobedience to employer work rules, absenteeism, tardiness or the like. Should some discharges (for example, a discharge occasioned by theft) be treated differently than discharges based upon poor performance? Deciding what types of practices fall outside of the job performance criteria discussed in paragraph (1)(A) needlessly will occupy the courts and employment lawyers for many years.

The Griggs test was clear and simple. The Court held that where an employment practice is shown to have a disparate impact upon the employment opportunities of a protected group, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S., at 432. That concept has been elucidated by the federal courts during the past twenty years. The simple Griggs formulation is consistent with established case law and with the stated intent of the bill.

Even if there was a need to create two business necessity standards, the proposed language raises serious problems. For example, requiring proof that the employment practice "must bear a significant relationship to successful performance of the job," as in paragraph (1)(A), could be construed to penalize employers who attempt to set their standards for "optimal" rather than "successful" performance. The Supreme Court in Griggs stated that "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins", 401 U.S., at 436, a proposition that remains equally vital today.

More important, "successful job performance" does not seem to take into account concepts such as safety, absenteeism, tardiness, accident rates or misconduct, which may not involve "job performance" but which are related directly to business needs and should be acceptable measures for employment criteria. The focus of the business necessity concept should be on the fit between the selection criterion and business needs. By concentrating solely on "job performance," the proposed definition apparently excludes consideration of financial and safety concerns applied by many courts in business necessity cases. In transportation cases, for example, the courts have applied a somewhat lower standard of employer justification because of the enormous damages to the business and danger to the public likely to result from a mistake in selection. Such rulings make practical sense, particularly considering the rebirth in many states of tort claims for wrongful or negligent hiring or retention of employees. Similarly, in cases involving high level jobs, the courts properly have applied a modified business justification test to ensure that employers have sufficient latitude to take into account criteria that clearly are job-related but insusceptible of definite measurement. In cases involving universities, for example, the proposed standards might invite a court or jury to conclude that academic excellence is not "significantly" enough related to "successful" job performance as a university professor.

By narrowing the focus of the business necessity concept in this fashion, the bill would exacerbate the problem noted by the Court in Wards Cove; how to adapt the Griggs principle to cases involving subjective employment criteria. For jobs in which "successful job performance" will be difficult to define, restricting the range of criteria upon which an employer may base its employment decisions invites employers to abandon merit-based principles. Such a result surely is contrary to the underlying purposes of the civil rights laws.

Even more troublesome, in this regard, is the unprecedented step of instructing the federal courts as to what evidence they can rely upon as proof of "business necessity." The bill requires that in deciding whether the employer has met the burden of proving "business necessity", "demonstrable evidence" must be adduced. It is not clear what evidence qualifies as "demonstrable" and what constitutes "unsubstantiated opinion and hearsay." Numerous employment selection measures are not susceptible of proof by "demonstrable evidence". For example, it is difficult to envision how an employer would be able to generate "demonstrable evidence" to prove that a favorable absenteeism or tardiness record is job related. The proposed legislation is built on the faulty premise that every employment practice, including interviews, supervisory ratings and the like, can be reviewed with scientific precision. Employer subjective judgments are important tools for selection of the best qualified workers, especially for higher level jobs where the attributes required for optimum performance are impossible of precise quantification. Yet for these positions and others, the bill calls into question an employer's ability to rely upon expert opinion, from qualified industrial psychologists or from company officials knowledgeable about a job's requirements, in order to substantiate a challenged practice. Is such opinion, unaccompanied by charts and statistical summaries, "unsubstantiated opinion"? Must an employer produce charts and statistical summaries in every case? Are the opinions of employer representatives who are most familiar with the job duties and workplace so completely unreliable that they must be outlawed by Congress, even though they otherwise might have some probative weight in court?

A "demonstrable evidence" requirement seems to command that a federal court accept only a portion of the evidence that may be relevant to the issue before it, and illustrates the problems that undoubtedly will arise when Congress begins telling the federal courts what types of evidence they may receive and consider in any given case. Federal courts rely upon the Federal Rules of Evidence in all cases that come before them, and there is no reason for devising special rules of evidence for employment cases.

3. Altering standards of proof in "mixed motive" cases. In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a case widely viewed as a victory for plaintiffs, a majority of the Supreme Court held that if a plaintiff proves that a prohibited factor (such as race or sex) was in part the motivation for an employment decision, the employer must prove that it would have made the same decision without consideration of the prohibited factor. But a majority of the Court in Hopkins also held the plaintiff initially must establish that the prohibited criterion played a "substantial" or motivating role in the employment decision. According to Justice O'Connor, for example, mere stray remarks in the workplace, unconnected to the employment decision in question, will not require an employer to assume the burden of proof. That holding comports with Title VII's basic design to rectify concrete harm caused by unlawful employment practices, as opposed to punishing impure or improper thoughts.

Section 5 of the bill undercuts the Court's agreement on this key point by stating that an unlawful employment practice is established once the plaintiff proves that a prohibited criterion was a "contributing" factor in the decision, regardless of whether consideration of the prohibited criterion had any significant or practical impact on the decision. The bill would allow an employer to avoid a reinstatement or back pay remedy by proving that the plaintiff would not have been selected or benefitted even if the prohibited consideration had not occurred. Even in this situation, however, the employer would have violated the law and the bill would authorize an award of compensatory and punitive damages, and attorneys' fees.

The requirement that the plaintiff establish some practical link between a prohibited factor and the employment action is extremely important because it allows the courts necessary discretion to dispose of claims based upon stray or inappropriate remarks in the workplace, or similar evidence. For example, consider a case in which a plaintiff plainly is not qualified for a particular employment opportunity. If an employer representative appropriately rejects the plaintiff because of her lack of qualifications, but inappropriately adds a comment that he never could envision a woman in the position in question, this bill would allow the plaintiff to sue for compensatory and punitive damages. While we agree that employer representatives should not make such comments or inappropriately consider the sex of the plaintiff in employment decisions, we see little justification for extending the jurisdiction of the overtaxed federal courts to comments that have no practical impact upon an employment decision. In our view, solving the problems of discrimination in the workplace are difficult enough without such unnecessary litigation.

4. Retroactivity. Section 15 would apply H.R. 1's changes in substantive law retroactively to the date of the Supreme Court decision being altered. The substantive changes made by the bill thus would apply not only to cases still pending on the date of the law's enactment, but to any court order "inconsistent" with the new law, so long as a request to vacate the order is filed within one year from the date of the new law. We submit that retroactive application of the new law is unwise, raises serious constitutional concerns and will result in a flurry of litigation that further will cause congestion in the courts.

This is particularly true with regard to the law's application to cases that have been resolved and are no longer in the federal system. Reopening of such cases arguably is beyond the scope of congressional power under the "vested rights" doctrine, which holds that adjudicated private rights are beyond the reach of future legislative action. See, e.g., McCulloch v. Virginia, 172 U.S. 102, 123-24 (1898). Moreover, as to such cases, there also is a question as to the congressional authority to "prescribe a rule for the decision of a particular cause in a particular way," United States v. Sioux Nation of Indians, 448 U.S. 371, 405 (1980). See also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). Surely the Supreme Court, and not the 102nd Congress, is the ultimate arbiter of the intentions of prior Congresses. Attempts by this Congress to "correct" the Supreme Court on matters of statutory interpretation raise grave questions in our constitutional system, and reopening of numerous final judgments on this basis simply multiplies those concerns.3/

Even more significantly, such wholesale reopening of final judgments raises serious practical concerns. During the nearly two years since the Supreme Court decisions in question, many cases have been settled by parties unwilling to await congressional action in this area. Consider, for example, a racial harassment claim

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3/ Indeed, the legislation would appear to reverse the Supreme Court's decisions in the very cases in which they were rendered. There could be no clearer example of Congress attempting to prescribe a specific rule for a specific case than attempting to revivify cases that have been settled through binding Supreme Court rulings.

under 42 U.S.C. § 1981 that was dismissed on the basis of Patterson v. McLean Credit Union, 491 U.S. 164 (1989). If the employer, believing that a reversal of Patterson was possible given last year's debate, settled the claim for a substantial sum during the appellate process, would it be appropriate (or lawful) to allow the plaintiff to vitiate the settlement by seeking an order to vacate? There is nothing in this bill that would exempt a final and binding settlement (confirmed by a judicial order) from the scope of the bill's language, yet it is difficult to believe that Congress could intend to overturn knowing and voluntary settlements in a wide range of civil rights cases. In such situations, it is difficult to avoid the conclusion that Congress would be tampering with vested rights in an improper manner.

As to cases still pending as of the date of the law's enactment, there also are pressing issues to be considered. The Supreme Court has held that retroactive application of changes in substantive law is the exception rather than the rule, and can be sustained only upon a showing of special justification. See, e.g., Pension Benefit Guarantee Corporation v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). Such special justification surely cannot be provided by this Congress's view that the Supreme Court misconstrued the intent of prior congressional enactments;

if that were true, the special justification standard would be meaningless and the Congress, rather than the Supreme Court, would become the final interpreter of legislative intent. Yet the Supreme Court is the ultimate arbiter of the intentions of prior Congresses. Conduct that has been found lawful based upon final Supreme Court interpretations of civil rights statutes in fact was lawful when it occurred. Making such conduct unlawful on the grounds of Supreme Court "error" is highly questionable.

Moreover, while we recognize the need to provide appropriate relief for victims of employment discrimination, this same justification -- providing relief for victims of mistreatment -- could be supplied for a wide variety of different federal statutes, thus allowing Congress to penalize much conduct through regular retroactive application of substantive legal changes. Therefore, we submit that the Congress should be quite clear in deciding why particular substantive changes are so important as to be applied retroactively, and should not rest its decision simply upon a finding that the High Court erred and thus "disenfranchised" a class of plaintiffs that the Congress would like to benefit.

5. Extending the statute of limitations under Title VII. Section 7 of the bill ostensibly is designed to overturn Lorance v. AT&T Technologies, 490 U.S. 900 (1989).

In Lorance, the Court held that the statute of limitations under Title VII for challenging a seniority system began running at the time the system was adopted, and not when the system had a harmful impact upon minorities or women. The Court's holding was based on the proposition that a seniority system is unlawful under Title VII only if the plaintiff can prove that it was adopted with an intent to discriminate. According to the Court, discriminatory intent occurs at the time the system is adopted or modified, and not every time it is followed to the detriment of minority or female employees.

We are not troubled by the bill's reversal of Lorance, but by its wholesale extension of Title VII's statute of limitations. The bill goes far beyond Lorance by allowing a charge to be filed at any time within 2 years of the date an unlawful practice occurred "or has been applied to affect adversely the person aggrieved, whichever is later." At present, charges must be filed within 180 days of an unlawful employment practice (300 days in a jurisdiction which has a state or local agency that administers a parallel statute). The courts also have held that the time for filing an employment discrimination charge begins running when the employee learns of the adverse action, not when the action "affects adversely" the plaintiff, Delaware State College v. Ricks, 449 U.S. 250 (1980), and that adverse effects of a discrete employment decision (e.g., an unlawful discharge that later is rescinded but continues to affect the plaintiff's seniority standing) are not perpetually actionable. United Air Lines v. Evans, 431 U.S. 553 (1977).

This section of the bill would overrule these well-accepted cases and extend Title VII time limits dramatically. An individual should not be allowed to sit on his or her rights for 2 years before filing a charge of discrimination. The intent underlying Title VII has been to seek prompt resolution of employment-related controversies. A two year statute of limitations would result in lost witnesses, lost memories, greater disruption in the workplace and more expense for employers, a substantial additional burden for the courts and a much less viable system for attacking employment discrimination.

Moreover, there is no reason to overturn existing law establishing that an employee should file a charge as soon as possible after the violation is discovered. The judiciary has created an exception to this filing requirement for "continuing violations," where employment systems or practices are repeated to the detriment of many employees. The continuing violation doctrine appropriately balances the rights of employers and employees, and there is no need to destroy the basic principle that an employee should file as soon as he or she discovers a problem.

CONCLUSION

There are a number of other provisions in this bill that we believe are of great concern, and which we would be happy to address in additional comments. Our hope is that the Congress will not plunge the country into an even more substantial era of divisive litigation in the name of civil rights enforcement. The path to true equal employment opportunity does not lie through court delays and litigation. Rather, effective equal employment enforcement depends upon a system of incentives that makes litigation the last resort, while providing full relief for the economic harms suffered by victims of discrimination and allowing the prompt alteration of exclusionary practices. Title VII's current remedial scheme is the cornerstone of such a system, and it should not be altered.

Chairman FORD. Beverly Hall Burns.

Ms. BURNS. Mr. Chairman, members of the committee, thank you for the opportunity to share some thoughts with you about Section 8 respecting damages. And I'd just like to point out at the outset that that context may already be somewhat limited, but my comments today are intended to be even more limited to you.

And those comments will speak specifically to the Michigan experience with a state law, whether wrongful discharge or employment discrimination, which permits for wide damage recovery, and which permits for jury trial.

First, I'd like to tell you very briefly about the professional path that brings me to you today, only for the purposed of allowing you to see some of the basis upon which I offer my opinions. I have been a newspaper reporter; I have been a city editor; I have been a freelance magazine writer; I have been a college professor; I have been a management side labor consultant.

For the past dozen years, I have been a management side labor attorney, and I'm now a senior partner with Miller, Canfield in Detroit. It's Michigan's oldest law firm, and it's one of the larger ones in the midwest. I represent public and private sector employers, ranging from school districts to manufacturing operations.

My law practice takes me into labor negotiating rooms; it takes me into the administrative courtrooms of the National Labor Relations Board and the state counterpart agency; it takes me to the EEOC; and it takes me to the Michigan Department of Civil Rights; it takes me to arbitrations hearings, to mediation sessions, and to courtroom, both Federal and state.

Our firm's clients, no differently I think, from most other private and public employers in the Nation would rather prevent employment discrimination and harassment than to suffer it along with their employees and society at large.

What I propose to do here today is to briefly describe from my perspective, as a practicing attorney, some of Michigan's experience under both the court-made wrongful discharge doctrine and our state's anti-discrimination law, both of which provide for jury trials and both of which allow a vast potential for money damages.

I think that our state's experience may serve as a fair barometer of what could happen under a Federal law which affords a right to jury trial and uncapped compensatory and punitive damages.

Within months of the historic state law decision in Michigan, the *Toussaint* case, which allowed law suits for unjust termination, Michigan state courts were clogged with lawsuits from terminated employees. That litigation has continued now for a decade. There has been wrangling over details such as damages that are potentially available to the terminated employee.

It's established now that plaintiffs do not recover exemplary and other noneconomic damages like emotional distress in what we refer to as a *Toussaint*-type wrongful discharge claim. But it's equally established that they may demand and they may recover front pay.

What has that done to jury verdicts under the *Toussaint* doctrine? I can tell you about a few; my materials speak to others. In one 1988 verdict, two employees had been terminated in 1985. After an investigation into sexual harassment charges against them, they were awarded $1.3 million by a state court jury, virtually all of which was front pay. That case, as I said, arises out of facts that occurred in 1985. That case remains on appeal. It remains unresolved today.

In a 1990 verdict, a terminated employee won $1.5 million from a state court jury, including a front pay award that was more than even he had asked for.

In another 1990 case, a female manager was accused of sexually harassing a male subordinate employee. The employer investigated the complaint and the manager, as a result of the investigation, was transferred to another position, resulting in no loss of pay or title. Nonetheless, the female manager complained of constructive discharge and she sued. The jury awarded her nearly a million dollars, virtually all of which was front pay.

What I'm saying is that as far as litigation under our state *Toussaint* doctrine of wrongful discharge goes, the claims continue through our state court system. They continue to take a very long time to resolve. And regardless of how you label them, the jury awards continue to be high.

Alongside the *Toussaint* claims is litigation premised on our state employment discrimination statute, the Elliott-Larsen Act. Elliott-Larsen is patterned in some substantial ways after Title VII, although it adds a few more protective classes; for example, marital status, height, and weight.

It is significantly differently in that the limitations period is substantially longer—three years. There is no requirement to exhaust administrative remedies. There is no statutory limit on possible damages, and jury trials are provided.

I have set out supporting details in my written statement to you, but I have a few things to say by way of summary. First, in my opinion, workplace disputes premised on alleged discrimination are not necessarily promptly resolved under Elliott-Larsen.

Second, we see many instances in which complaining employees either do not file administrative charges at all or they do so in order to get a quick preliminary look at what the employer's case will be, and then request the withdrawal of the charge so as to pursue court remedies.

Third, jury verdicts under the state law tend to be very high. Our firm did a review of jury verdicts over the past three years in some of the more populous counties in Michigan. And that review showed four verdicts that exceeded a million dollars; another half-dozen or so that exceeded a half-million; and 15 more that were in the lower six figures. In Michigan, even today, that's big bucks.

Of course, the bulk of employment cases, like other lawsuits, don't reach trial. They're settled. And I think that the potential for uncapped damages makes cases very difficult to settle.

Let me give you an example: Under Michigan court procedures, cases with claims for money damages pass through a process known as Michigan Mediation. That is, briefly, where a group of three lawyers, one of whom is to be a representative of the defense, one of the plaintiff's bar, and one a neutral, meet with the lawyers for the parties in a case. They hear the strengths and the weaknesses of a case and the make a mediator's award, which is intended to be a number that's high enough for the plaintiff to accept and low enough for the defendant to pay. In other words, what would it take to settle this case.

I think that even this process is affected by the potential for uncapped damages. Mediators find it very hard to place a value on the case. And the plaintiff who thinks that he or she has the case that might win the Michigan courtroom lottery is not inclined to accept a mediator's award.

One verdict for $640,000 in an employment case in Michigan recently had been mediated by a group of attorneys for $18,000. So it can be attractive for plaintiffs to spin that wheel. These case are expensive in time and money to defend.

I'd like to address very briefly what my materials may refer to as a backlash effect. We are seeing lawsuits now brought by disciplined or discharged harassers. That is to say the harassers are biting back. And employers who are making good faith investigations into harassment claims and taking action are being hit with lawsuits for having done that. In our office today we have at least half a dozen of those claims. This is a serious catch-22 an employer can find itself in.

If it takes assertive action to eradicate the discrimination by disciplining the discriminator, the discriminator may file a lawsuit. If it does not, the discriminatee may do the same. In some cases, both may sue.

I think that we need to address the need for some insulation or immunization against damage exposure to employers who make good faith investigations and either take disciplinary action or do not depending on the outcome.

And my final point is this, again, with some suggestion based upon recent Michigan statutory activity. I think it's appropriate now to place an affirmative responsibility on a harassment victim to put her or his employer on notice of the harassment.

In Michigan, for example, we recently amended our state handicappers law. One of the things we did was to require that an individual who needs accommodation of his or her disability must place the employer on notice, in writing, of the need for the accommodation within six months of the time the handicapper knew or should have known that the need existed.

I am not suggesting that six months is an appropriate time for notice of a harassment problem. I think that you can look to the success of grievance procedures to find that a much shorter time period is probably better. However, this notice procedure will serve Title VII's purpose of bringing prompt resolution to workplace EEO problems.

In sum, I think the Michigan experience with discrimination laws and a wrongful discharge theory which allow for sizable damage potential and jury trials give a strong indication that the purposes for which Title VII was adopted—prompt remediation of workplace EEO disputes—would be undermined with the addition of punitive damages and jury trials.

Thank you.

[The prepared statement of Beverly Hall Burns follows:]

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PREPARED STATEMENT
OF
BEVERLY HALL BURNS, SENIOR PARTNER
MILLER, CANFIELD, PADDOCK AND STONE
BEFORE THE
EDUCATION AND LABOR COMMITTEE
OF THE
U.S. HOUSE OF REPRESENTATIVES
Concerning Section 8 of H.R.1
The Civil Rights Act of 1991
February 27, 1991

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I. INTRODUCTION

My remarks are intended to deal, in a narrowly-circumscribed way, with the provision for compensatory and punitive damages and jury trials in Section 8 of the proposed H.R.1. They do so by reflecting on what I refer to as the "Michigan experience" under a statutory and case-law scheme which provides for both jury trials and wide-open damage recovery to plaintiffs who allege wrongful discharge or employment discrimination.

Accordingly, I do not address any other aspects of H.R. 1, nor do I address some damages-related issues that other speakers today may address--for example, research and conclusions about Section 1981 cases in the employment arena.

The points I address here are premised on a fundamental belief that by and large, employers today are committed to eradicating employment discrimination. That is your goal, as well. Thus, my concerns are not with the goal, but with the proposed means of reaching it--in view of the "Michigan experience."

You should know something of the background which I bring to this arena. For the past dozen years, I've practiced labor and employment law, from the management side, representing both public sector and private sector clients.

My practice, in the earlier days, was largely what I call "traditional" labor work--that is, labor contract negotiations with unions, grievance arbitration, work before the National Labor Relations Board or its state counterpart, the Michigan Employment Relations Commission. I became fairly well accustomed to seeing grievances and unfair labor practices resolved with some dispatch, either by way of a contractual grievance procedure, or the "NLRA model" of unfair labor practice resolution.

Today I spend a lot of time in "preventive" counseling with clients--talking through possible disciplinary or discharge actions before they are taken; training our clients and managers on EEO and other issues that confront them. I also spend much more time in litigation-related activity; and most of that is litigation under the state employment discrimination law and our judge-made wrongful discharge doctrine.

I continue to do professional research and writing, for publications such as Employee Relations Law Journal; I am a frequent speaker on discrimination and other topics for organizations like Institute for Continuing Education, American Arbitration Association and Council on Education in Management.

However, "the law" has not been my only career. I have been a newspaper reporter and city editor. I have been a college professor and a consultant to employers; I have been a magazine writer. Perhaps because of these other experiences in the world of work, I have a great interest in the "real life" consequences of the employment law under which we live.

It's in view of all of this that I offer my remarks today. They are my opinions alone--not our firm's clients' opinions, nor even those of other attorneys in my firm.[1]

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[1] While the opinions I may offer are mine alone, I gratefully acknowledge the contributions of my colleagues, and in particular the assistance of Alison Marshall, Esq., of our firm's Washington, D.C., office; and Claudia Roberts Ellmann, Esq., and Megan Norris, Esq., of our Detroit office.

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II. "THE MICHIGAN EXPERIENCE"

A. Wrongful Discharge Litigation

1. The Birth of the Theory

In 1980, the Michigan Supreme Court issued its landmark decision in a case called Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich 579; 292 N.W. 2d 880 (1980). That decision confirmed the "general rule" that, in the absence of distinguishing features, an employer may discharge an employee any time, with or without cause, as long as the discharge does not violate some statutory right held by the employee (for example, rights under civil rights statutes). However, an employment relationship in which an employee can be discharged only for "cause" may be created by an express agreement, either oral or written; or by the employer's policy statements which give rise to a legitimate expectation by the employee that he can only be discharged for good cause.

Within months of the Toussaint decision, thousands of lawsuits had been brought in Michigan courts by terminated employees, complaining of wrongful discharge under the new theory. In the decade since Toussaint, the litigation has continued.

2. Evolution of the Theory

The Toussaint theory has expanded in some respects, been circumscribed in others. For example, an expansive decision of the Michigan Supreme Court suggests that an employee may be able to enforce an oral promise made at hire (in this case, allegedly that the company would not discharge for any reason other than theft), even in the face of a subsequent, different written policy (in this case, permitting for discharges for a number of reasons in addition to theft). Bullock v. Auto Club of Michigan, 432 Mich. 472 (1989). Other decisions have declined to expand the theory--for example, Khalifa v. Henry Ford Hospital, 156 Mich App 485; 401 N.W. 2d 884 (1986) dismissed a plaintiff's Toussaint claim because the employer had a grievance procedure which provided that the determination of the "Grievance Council" was final and binding. The procedure, found by the court to be legally binding on the employee, included a hearing before a council comprised of nine non-supervisory employees, selected by their coworkers. They had full authority to affirm, reverse, or modify the discipline, and to reinstate the discharged employee if they felt such action to be warranted. All that is required of such a hearing, said the Court, is a "fair hearing," including "adequate notice of the time and place, a reasonable time for preparation, and an opportunity to present evidence and argument."

3. Damages under Toussaint

As to damages under the Toussaint doctrine, they have continued to swell, while the labels by which they are described may change from time to time.

It was 1984 before the Michigan Supreme Court spoke definitively on the issue of "exemplary" damages such as emotional distress and other non-economic damages. In Valentine v. General American Credit, Inc., 420 Mich. 256; 362 N.W. 2d 628 (1984), the Court held that unless a plaintiff can show tortious conduct independent of a contract breach, exemplary damages may not be recovered. A number of other cases have reaffirmed that.

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However, that does not mean that the damages recovered by prevailing plaintiffs in *Toussaint* litigation have been limited to, for example, lost back wages and benefits. To the contrary, the verdicts remain high; they are simply articulated as something other than exemplary sums. Particularly, plaintiffs are prevailing on "front pay" claims which are sometimes even greater than they, themselves, have demanded. This happened, for example, in one 1990 case tried for more than a month to a jury in the state court. Plaintiff's own demand, to the jury, was $900,000. That was mostly front pay. The jury award? $1.5 million.

In another jury trial case, the two plaintiffs had found other employment *within a few months of their separation,* albeit at lower rates of pay. Thus, they could demonstrate no significant back pay or front pay entitlements. The jury verdict? $600,000.

Whether a plaintiff has found alternative employment--and what impact, if any, his doing so or failing to do so has on his recovery of damages--is an issue which the Michigan courts have also addressed. In *Riethmiller* v. *Blue Cross*, 151 Mich. App. 188; 390 N.W. 2d 227 (1986), the State Court of Appeals held that an employee had no duty to mitigate by accepting *the same work he had performed prior to the discharge*. This was so, because the proffered status was as an independent contractor without fringe benefits. The Court did not accept the Defendant's argument that an $11-per-hour wage increase as an independent contractor would have more than made up for the loss of fringe benefits.

4. Toussaint and the "Discrimination Backlash"

It is unsurprising that many plaintiffs articulate their discharge cases not only in terms of Toussaint claims, but discrimination claims as well. What may not be so obvious is that some discriminators, fired because of their discriminatory behavior, use the "wrongful discharge" theory to challenge their own terminations. In one such case, for example, two plaintiffs were fired after a company investigation that found them guilty of misconduct and activity which was offensive and sexually harassing. While the lawsuit was pending, one of the plaintiffs got other employment which paid more than she had earned before she was fired; the other started a business. Three years after the discharges, the case was tried to a jury. The result? Nearly a million and a half dollars--about $1.2 million of which was identified as "front pay."

B. Elliott-Larsen Litigation

1. Elliott-Larsen Protections and Procedures

Along-side the Toussaint-based claims, and continuing in an endlessly creative fashion, is litigation premised on our state's anti-discrimination statute, the Elliott-Larsen Act.

Elliott-Larsen, patterned in some significant ways after Title VII, adds some protected classes--marital status, height and weight, for example--and is substantially different in that the limitations period is much longer; there is no requirement to exhaust administrative remedies; there is no statutory limitation on possible damage recovery; and jury trials are assured.

Under Elliott-Larsen, a claimant may, but does not have to, file an administrative charge with the Michigan Department of Civil Rights, which is responsible to investigate and try to resolve that charge. The claimant has three years in which to file her or his lawsuit, and the State Supreme Court has adopted the "continuing violation" theory for damage recovery, which says that so long as one complained-of act occurred during the three-year period, a claimant may go back in time more than three years in order to demonstrate damages.

If the claimant starts out with a charge before the Department of Civil Rights, but decides to go to court, she or he can simply ask to have the charge withdrawn.

When a claimant goes to Court, she or he is most likely to articulate a broad damage demand, and ask for a jury. The case is liable to take two, maybe more, years in the pre-trial stage, and by Michigan procedure, will be mediated by a panel of three lawyers who have been charged with arriving at a "settlement value" for the case. This procedure, known as "Michigan Mediation," is applied to cases with demands for money damages. Its sole purpose is to assess the strengths and weaknesses of a case, from a pragmatic point of view; to apply a settlement value which is high enough that the plaintiff is encouraged to accept but low enough that the defendant is encouraged to pay; and then to afford the parties the opportunity to agree with the assessment.

If the case is tried, Michigan plaintiffs win in well over half the cases. That number is even higher as against private employers, where 86% of the verdicts favor the plaintiffs.

While Elliott-Larsen is devoid of language entitling plaintiffs to exemplary or punitive damages, and while the Michigan Supreme Court has affirmed that exemplary damages are not awarded under the Act apart from actual damages, Eide v. Kelsey-Hayes Co., 154 Mich. App. 142, 397 N.W. 2d 532 (1986), aff'd 431 Mich. 26, 427 N.W. 2d 488 (1988), plaintiffs continue to win very high awards from juries. This, it bears noting, is even without the statutory imprimatur for punitive damages incorporated to proposed H.R.1.

2. How the Plaintiffs Fare at Trial

We reviewed jury verdicts in some of the more populous counties in Michigan, for 1988, 1989 and 1990 (Genesee, Ingham, Kalamazoo, Kent, Macomb, Oakland, Washtenaw and Wayne). Four are in excess of a million dollars; another half dozen range from $500,000 to a million; 15 more are between $100,000 and half a million. The cases are summarized below:[3]

a. Sexual Harassment Verdicts

(i) $1,100,000. Plaintiff was required to take certain company classes as part of her job. According to plaintiff, during those classes she was subjected to sexually oriented conversations, and the teacher once played a sexually explicit tape. There were no allegations of comments directed specifically at plaintiff, nor were there allegations of quid

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[3] Verdict information is taken from Michigan Trial Reporter, which compiles data from court records and attorneys involved in trials, and is published monthly from offices at 323 E. William, Suite 221, Ann Arbor, Michigan 48104. Additional information was obtained from The Detroit Bar Association's "Jury Verdict Results" published periodically from data provided by Wayne County Circuit Court judges.

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pro quo harassment or physical harassment. Plaintiff was terminated for absenteeism.

(ii) $640,000. Plaintiff alleged that she suffered sex discrimination, harassment, and was terminated because she was going to testify against her employer in another harassment case.

(iii) $600,000. Plaintiff claimed that she was subjected to verbal harassment which led to her constructive discharge. She did not allege any physical harassment or quid pro quo harassment. Her lost wages as a result of the constructive discharge were only half of the verdict ($300,000 in lost wages).

(iv) $400,000. Plaintiff alleged that she was subjected to offensive verbal comments, so she had to quit (no claim of quid pro quo or physical harassment). Plaintiff rejected an unconditional offer of reinstatement. The case mediated for $25,000.

(v) $299,000. Plaintiff alleged constructive discharge as a result of verbal harassment.

(vi) $131,000. Plaintiff alleged that she was subjected to a "birthday kiss" and verbal harassment. Plaintiff never complained about this harassment prior to filing her lawsuit. The entire verdict was for emotional distress. Plaintiff still has her same job.

(vii) $107,000. Plaintiff was laid off due to economic cutbacks. She alleged that her performance suffered as a result of her supervisor's improper advances, which is why she was chosen to be laid off. Plaintiff recovered $38,000 in emotional distress.

(viii) $93,000. Plaintiff alleged that she was subjected to sexually explicit remarks on three occasions. Her lost wages were $18,000.

(ix) $16,000. Plaintiff's sole complaint was that her male co-workers "stared at her body."

b. Largest Verdicts

(i) $1,582,000 (race discrimination). Plaintiff was a teacher whose contract was not renewed. Plaintiff received $500,000 in emotional distress; the remaining $1,082,000 was for lost back and front pay.

(ii) $1,212,000 (demotion on the basis of age). This case involved two plaintiffs ($622,000 for one, $590,000 for the other). Defendant changed its compensation plan, reducing commissions from 7% to 5%. Because plaintiffs' sales suffered, they were demoted. Plaintiffs claimed that the compensation plan change (and, therefore, their demotion) discriminated against older workers. Plaintiff's were not terminated, and their only lost wages came in the form of reduced commissions. Plaintiffs' settlement value on case: $100,000.

(iii) $1,100,587 (discharge on the basis of age). Plaintiff was terminated for failure to meet sales quotas. The entire verdict was for lost past and future wages.

(iv) $871,000 (demotion on the basis of sex). The defendant demoted plaintiff because she sexually harassed a subordinate. The entire verdict was for lost wages (her back wages were less than $100,000).

(v) $525,000 (racial harassment). Plaintiff alleged that he was subjected to racial slurs. The entire award was for emotional distress.

(vi) $500,000 (national origin discrimination--hostile environment, failure to promote). Plaintiff alleged that he was given "dirty work," subjected to derogatory remarks and graffiti concerning his Lebanese heritage. Plaintiff further alleged that his employer failed to act on his grievances and that he was denied promotions. He was not terminated, nor did he quit, so virtually all of the verdict was for emotional distress.

(vii) $500,000 (race discrimination, failure to promote). Defendant claimed that the most qualified person was promoted. Plaintiff was not terminated and did not quit.

(viii) $325,000 (discharge on the basis of age). Plaintiff's position was eliminated in the course of economic cutbacks. Plaintiff was offered another position but refused to take it.

(ix) $300,000 (termination on the basis of age). Defendant alleged that plaintiff was terminated for poor performance. Plaintiff's lost wages were $220,000.

(x) $300,000 (termination on the basis of age). Plaintiff was laid off during a reduction in force. Over half of the verdict was for emotional distress ($145,000 in lost wages).

(xi) $300,000 (constructive discharge, age and handicap discrimination). Plaintiff claimed $175,000 in lost income; the rest of the verdict was for emotional distress.

(xii) $300,000 (termination on the basis of age). Defendant alleged that plaintiff was terminated for failure to meet sales quotas. Plaintiff agreed that he did not meet his sales quota, but argued that the quotas were applied only to old people. Defendant argued that the quotas were applied to incumbent people, but that new people functioned more as customer service (e.g. complaint) people than sales representatives, so the quotas did not apply to them. It is not clear what portion of the verdict was for lost wages.

(xiii) $257,000 (discharge on the basis of race). Plaintiff's lost wages were $197,000. Plaintiff received $60,000 in emotional distress.

(xiv) $200,000 (constructive discharge, race and sex discrimination). Plaintiff alleged that she was given the least desirable job assignments, so she had no choice but to quit.

(xv) $124,000 (constructive discharge, national origin harassment).

c. Verdicts Higher Than Plaintiff's Settlement Demand

(i) $192,000 (hostile environment, constructive discharge, age discrimination). Plaintiff alleged that unreasonable demands were place on him in an attempt to force him to quit, which he ultimately did. Plaintiff's final settlement demand was $50,000.

(ii) $92,000 (termination on the basis of race, retaliatory discharge). Defendant claimed that it had good cause for termination. Plaintiff's final settlement demand was $75,000.

(iii) $100,000 (race discrimination). This was a failure to promote case in which the plaintiff was not terminated and did not quit. Plaintiff's demand: $10,000. *See also*, b above.

d. *Verdicts With a High Percentage of Emotional Distress Damages*

(i) $155,000 (termination on the basis of race, retaliatory discharge). Defendant alleged that plaintiff was terminated for falsifying his resume, but the termination was after plaintiff filed a race discrimination charge. Over one third of the verdict was for emotional distress (plaintiff alleged $100,000 in lost wages).

(ii) $135,000 (termination on the basis of sex and race). Plaintiff received $50,000 for emotional distress.

(iii) $75,000 (harassment on the basis of handicap). The entire verdict was for emotional distress. Plaintiff still has his job and had no lost wages.

(iv) $61,000 (termination on the basis of age). Plaintiff was laid off in the course of a business merger. Lost wages and benefits totalled $45,000--the remaining $11,000 was for emotional distress. The Court did not allow future damages because the company was later sold, so they would have been too speculative.

(v) $41,500 (termination on the basis of age). Plaintiff had only $10,000 in lost wages, no future wage loss because she had obtained a better job after her discharge.

See also, verdicts above.

e. Disproportionate Front Pay Awards

(i) $69,225 (constructive discharge). Plaintiff was unhappy with her job (for reasons apparently unrelated to any discrimination). When she complained, she was told that if she was unhappy, then maybe she should "move on," which she did. Plaintiff lost only $1,725 in back pay. The rest of the award was for front pay.

See also, verdicts above.

III. CONSEQUENCES OF THE "MICHIGAN EXPERIENCE"

A. Slow Resolution of Disputes

Workplace disputes premised on alleged discrimination are not resolved quickly, under the Michigan system. For example, in one case based on 1987 terminations, the State Court trial lasted for five or six weeks, in April, 1990. The judgment was not entered until October, 1990. Appeal briefs are not due until March, and there is no way to predict when the matter will be completed. Another case, with a 1988 verdict, remains unresolved at the state Court of Appeals level. Briefs were filed in 1989; oral arguments have not even been scheduled.

B. Administrative Procedures Go Unused

Complaining employees often either do not file administrative charges at all, or they do so in order to get early, cost-free discovery on their claims. The State Department of Civil Rights is obligated to investigate, so when a charge is filed, the investigation commences and may continue for some time. Frequently, the charge is withdrawn by the charging party without an agency finding other than that the "charging party has requested withdrawal of the charge in order to pursue his remedies in court."

C. High Jury Awards

Jury verdicts have become, and remain, very high. This is clear from the outcome survey, above Section II(B)(2).

D. Difficulties With Settlement

Most cases still settle, but the potential for uncapped damages makes settlement very difficult. Plaintiffs and their lawyers who hear of high jury verdicts are not encouraged to settle their cases when mediation or other alternative dispute resolution methods raise more modest, but earlier, settlement possibilities. I think the mediation process is affected by the potential for uncapped damages. It is very hard for the mediators to place a value on a case; and a plaintiff who thinks she or he has THE case that will win the "Michigan Discharge Lottery" is unlikely to accept a mediator's award. The $640,000 case I described to you mediated for $18,000. That is what three attorneys--plaintiff-oriented, defense-oriented, and neutral--thought of the case. The $1.1 million verdict came after a final settlement demand from the plaintiff of less than one-tenth that amount. The plaintiff himself thought his case was worth $100,000. He got $1.1 million. You can see it may be attractive to a plaintiff to spin that "Wheel of Fortune."

E. Expensive Litigation

These cases are also very expensive, in time and money, to try. The trials often run into months, not weeks or days. In view of the stakes, you can understand this phenomenon; however, an already-overloaded state court system finds it difficult to accommodate. I think you will find the same thing to be true when you sent Title VII claimants to federal court with the same potential for jury trials and damage recovery.

F. Suits by Disciplined/Discharged Discriminators

The harassers are biting back. That is, we are seeing a significant upswing in lawsuits brought by disciplined or discharged harassers. Employers who are making good faith investigations into harassment claims, and taking action, are being hit with lawsuits for having acted. We have at least half a dozen active cases on this issue, in our office today. This is very serious--you can see the "Catch-22" the employer is in. If it takes assertive action to eradicate the discrimination by disciplining the discriminator, he or she is going to file a lawsuit. If it does not, the discriminatee will do the same. In some cases, both may sue. I think you have to incorporate some insulation or immunization from liability on this point, for the employer who makes a good faith investigation and either takes disciplinary action or does not, depending on the outcome of the investigation.

G. Need for Notice

Finally, it is time to put an affirmative responsibility on the harassment victim to put her or his employer on notice of the

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harassment. If notice is not given, the employer should be insulated from liability. Here is a parallel to help you see the point: In Michigan, we recently amended our handicappers discrimination law. One of the things we did was to require that a person who needs accommodation of her or his disability must place the employer on notice, in writing, of the need for accommodation within six months of the handicapper knowing the accommodation was needed. If this is not done, the handicapper may not make a "failure to accommodate" claim. I am not suggesting that six months is an appropriate time for notice of a harassment problem. I think you can look to the success of workplace grievance procedures to find that a much shorter time is probably better. This kind of approach would help, as a practical matter, because it's often very hard to shed the light of truth on a complaint brought years after the events occurred. Further, it will help to discourage practices like the one we discovered through a plaintiff's deposition in one of the sex harassment cases our office is defending: specifically, the plaintiff testified that she did not report the sex harassment to her employer because her attorney told her not to; rather, the attorney told her to just string it out to see what else might happen. Most important, however, a notice requirement would serve Title VII's purpose of bringing prompt resolution to workplace EEO problems.

IV. CONCLUSION

In sum, I think the Michigan experience with discrimination laws and a wrongful discharge theory which allow for tremendous damage recovery and jury trials has demonstrated that the very purposes for which Title VII was adopted--prompt remediation of workplace EEO issues--would be undermined and frustrated with the addition of compensatory and punitive damages, and jury trials.

Chairman **Ford**. Mr. Golden.

Mr. **Golden**. Mr. Chairman, members. Because of the lateness of the time that I found that I was coming, I ask the Chair to allow me to submit a written presentation in the next ten days and have it admitted to the record.

Chairman **Ford**. Without objection, it is so ordered.

Mr. **Golden**. Thank you.

Chairman **Ford**. I should observe that I was surprised that suddenly a law firm in Detroit took an interest in this legislation. I practiced for 14 years in Detroit before I came to Congress.

And I've just been told by the staff that last year the lawyers came from California to tell Gus Hawkins about the California experience. And I'm happy that they noticed the Chairmanship of this committee has moved from California to Michigan. At least that much has been accomplished by these hearings.

But don't overlook Mr. Henry. He's also from Michigan, but he escapes the program that's been coming, to my surprise, from lawyers at the table about lawyers making money. He's a real teacher who didn't make money as a lawyer before he came here.

Go ahead, Mr. Golden.

Mr. **Golden**. Thank you. I've been a labor lawyer for 22 years. I currently am the counsel of the American Bar Association Section of Labor and Employment Law, and will soon be the president of the National Employment Lawyers Association, which is made up of almost a thousand attorneys throughout this country who practice specifically in the area of wrongful dismissal and workplace discrimination.

I also have experience—the Michigan experience—practicing under the Elliott-Larsen Civil Rights Act so that I have had no need, really, to use Title VII to any great extent. The Act, as Ms. Burns has indicated, does provide for compensatory damages. I will limit my remarks to responding to what's been said. I know time is of the essence.

First of all, I do not believe that Title VII in its present form, which is remedial relief in terms of reinstatement, is adequate and works. In most instances, and I think a study by the NLRB two years ago indicated that when they resolve disputes and put people back to work, in 60 percent of those cases, within one year that employee is gone.

The workplace is not the same for that employee after the dispute supposedly is over and reinstatement takes place. I believe that the only adequate relief is to make the employee whole for the losses that he or she has sustained.

Now there are certain instances with high-level employees where reinstatement might work. We heard a couple of cases earlier about professional women who can go back in the workplace and, I'm not sure, regain or gain the respect of their peers. But at least it's tolerable. In most instances, I don't believe that that's adequate.

With regard to having compensatory damages destroying the incentives to settle early, I believe that just the opposite is true. We have now had enough experience in terms of employee rights litigation. We know how much these cases cost. They're terribly expensive for the defense. That's one incentive to settle.

Liability now, because the law if more defined, is clear at the outset. When these laws were newer it was muddle. You didn't know if you were going to get to a jury or not. Now it's easier to know. You have case law. You can evaluate. From the standpoint of the plaintiff's attorney, you must evaluate.

The practice of law is still a business. You don't take every case. You must evaluate, you must investigate before you make a decision to represent a client. From the business standpoint, you have to do it in order to be able to practice another day.

From the standpoint of the wronged employee, or at least the perceived wronged employee, if the employee himself or herself is wrong, it's the attorney's responsibility to tell that employee at the earliest possible stage. Nothing is worse than to take an employee through two or three years of a lawsuit, with all the anxiety that's associated with going through a lawsuit, and having people point fingers at that person in terms of not being a good employee, being the wrong—not being the wrong person, but being the person who committed the wrong, which necessitated the firing or necessitated the leaving, and then find out that you come up empty at the end. It's devastating.

Being fired or being forced to leave is devastating enough. But to go through the judicial process and then to find that you have nothing at the end is even worse. There's too much anxiety associated with a lawsuit for the plaintiff's bar not to take the responsibility of making sure that they have an adequate cause of action before they start. And not because of Rule 11 of the Federal Rules, but just because of the responsibility that we have as attorneys.

I think we've taken that role very seriously. Out of 20 calls that I get, I take one case. A lot of people call and a lot of people come to see me, and a lot of time is spent evaluating. But that doesn't mean because you walk in the door that there's going to be a lawsuit. And I believe that the plaintiff's bar acts in a similar fashion throughout this country.

With regard to the statement that uncapped damages will come about if there is an amendment to H.R. 1, I don't understand "uncapped." If you're working and you get another job, you're entitled to the difference between what you were making at the old job and what you're making at the new.

If you have emotional distress damages that you are claiming, you have to prove them. It's a matter of burden of proof. And it's on you, the plaintiff to prove them. If you have a doctor who says that you've suffered, there can be a doctor on the other side that says you haven't. Like in other cases, you must prove your claim.

The problem that I see here is that the employers don't want to change. There's plenty of cases out there. There's plenty of discrimination out there. We're very busy as a plaintiff's employment bar. And although we scrutinize carefully, we have a lot of work to do because employers will not change. People bring their prejudices to work and they carry them out in the workplace.

Companies may have policies that say we do not discriminate, but the companies are not the same as the individuals who are carrying out the orders or giving the orders.

I don't believe we're talking about uncapped damages. If you can prove your case, like in any other case, and you can sustain your burden of proof, you're entitled to recovery. That's all that the plaintiff's bar is asking. And I think that the amendment to H.R. 1 will do just that—give you your just due, make you whole.

No windfalls. Windfalls in terms of million dollar cases that have been spoken about. A million dollar case is a $150,000 case that the defendant refused to settle and made the plaintiff go to trial. And the plaintiff said that this is the outside of what my client could lose. And because of something, usually, that the defendant did, or the defendant's attorney did—because attorneys lose cases, they don't win them—the jury gave the plaintiff all the money that he or she asked for. That could have been avoided by the defendant paying a reasonable amount of money to resolve this case.

Ninety-five to ninety-six percent of all these cases settle. They don't go to court. And they settle because reasonable people recognize that there has been an injury and that there is liability and that this is the way that these matters should be resolved.

The cases that have been cited here are cases where people were not reasonable. You're going to find that anywhere where human nature comes into play. But I don't believe that we should revert to what we had in terms of a remedial type of end to this statute where my clients are not made whole. They are forced to go back into circumstances where they probably will not stay. And they are never compensated for intentional infliction of distress by people who, up until this time, feel that they can get away with it.

I think that it is time that we realize that when you take something away from someone, not necessarily cutting off an arm in an accident, but cutting off something inside—self-respect, self-esteem, the opportunity to live one's life in a reasonable manner—you must pay. That's our system. And until we find a better one—and I'm not sure there is a better one—that is justice.

And that's what I think has to happen here. And I believe in the amendment and I think it's a positive force and part of the social reform that we're seeing in employee rights throughout this country.

Thank you.

Chairman **Ford**. Thank you.

Pamela Hemminger.

Ms. **Hemminger**. Mr. Chairman and members of the committee, I am Pam Hemminger, a partner in the law firm of Gibson, Dunn & Crutcher in Los Angeles. I have represented employers in labor and employment matters for over 14 years.

The subject matter of my testimony today is what has occurred in California since approximately 1980 when tort damages, including damages for pain and suffering and punitive damages, became available in wrongful termination and in employment discrimination cases.

I think it is fair to say that the number of employment cases, actual and threatened, exploded in California as juries began to return verdicts in staggering amounts. And I will share with you some quite recent data on jury verdicts in California.

It became more difficult to settle cases for reasonable amounts due to inflated expectations and an inclination by many employees and their counsel, not all, to roll the dice and hope for a windfall verdict. Yes, for all the costs, monetary and nonmonetary, associated with these developments, relatively few employees have benefitted.

It is my concern that the amendment to Title VII to allow compensatory and punitive damages will lead to the same result. My views are based upon my work on labor and employment matters and upon my familiarity with the views and experiences of many other California practitioners and responsible employers.

I am currently a member of the Executive Committee of the labor section of the Los Angeles County Bar Association, and have been chair of the legislative subcommittee of the Employer Relations Committee of the California Chamber of Commerce for the last several years. As an appointee of former Governor Deukmejian, I serve as a member of the California comparable worth task force from 1984 to 1986, and co-authored the minority report on comparable worth issues to the California legislature.

I have written and spoken extensively on employment issues, and employment discrimination issues in particular. While employment litigation forms a substantial part of my practice, assisting employers with compliance, with both state and Federal equal employment laws, is an equally important part of my practice. I fully support the goals of Title VII in eliminating all vestiges of unlawful discrimination from the workplace.

I'd like to thank the committee for the opportunity to appear before you. My testimony will be limited to Section 8 of the proposed act in light of the California experience. The views I express are my own, and I do not appear on behalf of any clients or on behalf of any organizations with which I am affiliated. What I hope to do is to give you a practical look, from the perspective of a practicing lawyer, about the effects of making tort and punitive damages available in employment cases.

In 1980, the California Supreme Court decided the case of *Tameny* v. *Atlantic Richfield*. That case held that compensatory and punitive damages are available when employment is terminated for reasons which violate public policy. That decision was quickly followed by other Court of Appeals decisions which broadened the theories upon which an employee could sue for wrongful termination sounding in tort.

Finally, in 1982, it was held that punitive damages are available in employment discrimination cases under California anti-discrimination law, the Fair Employment and Housing Act. It's interesting to note that availability of compensatory and punitive damages in employment discrimination is not the result of a legislative act, but was the result of a California Supreme Court decision interpreting the Fair Employment and Housing Act delineation of equitable remedies as applicable only to cases decided by our Fair Employment and Housing Commission, and did not prevent employees from recovering these types of damages in court.

It's fair to say that these developments led to a tremendous increase in threatened and actual employment litigation. The verdicts have received a great deal of publicity in California, generating still more lawsuits in what has commonly been referred to by many as the other California lottery.

I think it's interesting and apt to note the frequency with which references to gambling are made when discussing these tort lawsuits. Even some of the judges, in deciding cases, often refer to the gambling analogy.

In the study of wrongful termination litigation published by the Rand Institute, analyzing 120 jury trials in California, from 1980 to 1986, the authors report that plaintiffs prevailed in 68 percent of the cases. Average verdict in which plaintiffs prevailed, was approximately $650,000. The median was $177,000. Punitive damages were awarded in a large number of these cases.

I'd like to quote very briefly from the report itself: "Juries decided in favor of plaintiffs in 81 of the 120 cases, or 67.5 percent. The average award, including defense judgments, was $436,626. On average, about 60 percent of this total was compensation. However, one-third of all trials, or about one-half of the plaintiff victories, resulted in punitive damages being awarded. The average, excluding defense judgments, was $646,000. For these 40 trials, the average punitive damages award was $523,170. Of course, expected verdicts or trial averages are reduced by about one-third when defense victories are included."

Thus, that the risk of—or promise, depending on your perspective—of punitive damage assessments is very real, is revealed by the fact these damages were awarded in fully 50 percent of the cases in which plaintiffs prevailed.

The large jury verdicts in unpredictable amounts continue to be awarded despite the cutback by the California Supreme Court, in a case known as *Foley* v. *Interactive Data*, of the availability of tort damages in one kind of wrongful termination case.

As reported in the most recent publication of the California Labor and Employment Law Quarterly—and that is the official publication of the California State Bar Labor and Employment section—62 employment-related verdicts for plaintiffs have been issued since December 1988 when *Foley* was decided. The average verdict was $1,596,000, and the median was $405,000. As noted in the article, this median is significantly higher than the medians reported in the previous pre-*Foley* studies.

Incredibly, 20 plaintiffs received verdicts of over $1 million. The five highest verdicts were $45,376,000; $17,522,000; $2,468,000; $2,275,000; and $2 million. These results may be attributable to the fact that the focus of employment litigation has changed, since *Foley*, with an increased emphasis on causes of action for a wrongful discharge and violation of public policy, and for employment discrimination.

It should be noted that in wrongful termination cases in California, in many instances discrimination claims are joined with wrongful termination claims in the same lawsuit.

The conclusion, I think, is inescapable, that the availability of tort damages in California has led to very large jury verdicts. The cost to employers has been high. But I think for this committee to consider, it's important to note that employees in general have not necessarily benefited from these developments.

In *Foley*, the California Supreme Court quoted Professor Gould of Stanford University as follows: "Professor Gould asserts the new common law of wrongful discharge has provided employer and employee with the worst of all possible worlds. Employees are subject to volatile and unpredictable juries that frequently act without regard to legal instructions. Moreover, the employees who benefit are few and far between." And the court continues to quote from Professor Gould.

It has become difficult to settle cases. Pain and suffering damages are extremely difficult to quantify, particularly in the absence of any physical injury. It is very difficult to predict what a jury will do with regard to punitive damages. As a result, a meeting of the minds concerning the value of the case for settlement purposes, is often difficult to achieve.

An increasing number of plaintiffs, who have chosen to litigate in court, have resulted, in my view, in the decreased ability of the Department of Fair Employment and Housing—and that's the enforcement agency in California, to engage in the fact-finding necessary to conciliation.

Employers are necessarily required to very carefully review their statements and their conduct in dealing with the agency, in light of the very real possibility that those statements are going to be used in future court litigation to support large damage awards. And they are understandably reluctant to admit that discrimination may have occurred. This is in contrast to the situation where "make-whole" relief is the relief available. In such a situation, an employer has little reason not to freely admit that its conduct may have been improper, such as the case, and quickly resolve the case.

Lawyers are brought into the administrative process at the earliest administrative stage. The DFVH and the whole agency process is now regarded by many lawyers as merely an annoying but necessary procedural step which must be taken on the way to the courthouse. Resolution of employment disputes has been delayed. In California it's not uncommon for cases in the Superior Court system to take up to five years to be brought to trial because of the increasingly congested docket.

It can also be expected that the group that will benefit the most, if compensatory and punitive damages become available, will be attorneys. Defense attorneys as well as plaintiffs' attorneys. In the wrongful termination cases decided by the Rand Institute, they reported that less than half of the money that changed hands in the wrongful termination cases, went to the plaintiff. When the average defense fee of $90,000-plus is added to the average contingency fee of $119,000, comparing with the $188,000 that went to the plaintiff, realize lawyers received a total of $209,000, while the plaintiff received $188,000.

There are other impacts of the California development. The threatened wrongful termination cases are not filed in court. It's a common practice in California for plaintiffs' attorneys to start claims by letter, often including a copy of an unfiled complaint. These cases, which are often settled in large amounts, are not reflected in the statistics concerning the large number of cases that have been filed.

In summary, I believe that the California experience provides valuable information about the potential negative consequences of the abandonment of the Title VII model, which is designed to promote expeditious and remedial relief in favor of an adversarial individually-focused tort scheme.

While I am in complete agreement with the principle that employment discrimination has no place in the workplace, I do not believe that making compensatory and punitive damages available is the appropriate way to advance that goal. Instead, I believe that the substantial negative effects would far outweigh the benefits of such a fundamental refocusing of the equal employment laws.

I'd like to make one further comment for the committee's consideration, and that is, that there has been a development in the last several years in California of thoughtful individuals from a varying range of backgrounds, including those who most certainly have never been associated with the representation of employers, exploring alternatives to the court system based on a belief that the conversion of employment cases to court system cases really has not worked to the benefit of employers and employees.

Finally, I'd like also to mention that one remedy that is available, that has not yet been discussed, is the availability of front pay in Title VII cases in situations where an atmosphere has generally been so poisoned that it is not appropriate to return the victim of discrimination to their old job. Not all courts do award front pay, but a large number of them do.

Thank you very much.

[The prepared statement of Pamela Hemminger follows:]

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TESTIMONY OF PAMELA L. HEMMINGER

BEFORE THE COMMITTEE

ON EDUCATION AND LABOR

UNITED STATES HOUSE OF REPRESENTATIVES

DAMAGES PROVISIONS OF THE CIVIL RIGHTS ACT OF 1991

Wednesday, February 27, 1991
Washington, D.C.

GIBSON, DUNN & CRUTCHER

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DAMAGES PROVISIONS OF THE
CIVIL RIGHTS ACT OF 1991

Wednesday, February 27, 1991
Washington, D.C.

Mr. Chairman and Members of the Committee:

I am Pamela L. Hemminger, a partner in the law firm of Gibson, Dunn & Crutcher in Los Angeles, where I have represented employers in labor and employment matters for over 14 years.

The subject matter of my testimony is what has occurred in California since the early 1980s when tort damages, including damages for pain and suffering and punitive damages, became available in wrongful termination and employment discrimination cases. The number of employment cases, actual and threatened, exploded as juries began to return verdicts in staggering amounts. Defense costs escalated as a result of the potential exposure, and it became difficult to settle cases for reasonable amounts due to inflated expectations and an inclination by many employees and their counsel to "roll the dice" and hope for a windfall verdict. Yet, for all the costs, monetary and nonmonetary, associated with these developments, relatively few employees have benefited. It is my concern that the amendment of Title VII to allow compensatory and punitive damages will lead to the same result.

My views are based upon my work on labor and employment matters and upon my familiarity with the views and experiences of many other California practitioners and responsible employers. I am currently a member of the Executive Committee of the Labor Section of the Los Angeles County Bar Association and have been Chair of the Legislative Subcommittee of the Employment Relations Committee of the California Chamber of Commerce for the last several years. As an appointee of former Governor Deukmejian, I served as a member of the California Comparable Worth Task Force from 1984-1986 and coauthored the minority report on comparable worth issues to the California Legislature. I have written and spoken extensively on employment issues and employment discrimination in particular. While employment litigation comprises a substantial part of my practice, assisting employers in complying with both the letter and spirit of state and federal employment laws is an equally important aspect of my practice. I fully support the goals of Title VII in eliminating all vestiges of unlawful discrimination from the workplace.

I thank the Committee for the opportunity to appear before you. My testimony will be limited to Section 8 of the proposed Act in light of the California experience. The views I express are my own, and I do not appear on behalf of any clients or on behalf of any organizations with which I am affiliated. I hope to give you a practical look from the perspective of a practicing lawyer about the effects of making tort and punitive damages available in employment cases.

THE AVAILABILITY OF TORT REMEDIES WILL RESULT IN A FUNDAMENTAL CHANGE IN THE FOCUS OF TITLE VII

If Title VII is amended to permit the recovery of compensatory and punitive damages, it will be transformed from a remedial statute designed to efficaciously eliminate unlawful discriminatory practices to one emphasizing individual tort-like causes of action. This has been the California experience. Such a transformation will mark a major departure from the manner in which Congress has historically chosen to regulate matters arising in the workplace. Every statute which Congress has enacted in the labor and employment arena has focused on make-whole remedial remedies. Such comprehensive statutory schemes include the National Labor Relations Act, the Equal Pay Act, the Employee Retirement Income Security Act, the Rehabilitation Act, the Age Discrimination in Employment Act, the Worker Adjustment and Retraining Notification Act and the Americans with Disabilities Act. These comprehensive legislative enactments governing employment disputes reflect the recognition that such matters are best resolved quickly with the assistance of expert administrative agencies. The goal of Title VII in particular has been the elimination of discrimination with cooperation, conciliation and voluntary compliance as the preferred means for accomplishing this end.

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THE CALIFORNIA WRONGFUL TERMINATION EXPERIENCE DEMONSTRATES THAT THE AVAILABILITY OF TORT DAMAGES RESULTS IN SIGNIFICANT COSTS WITHOUT CONFERRING CORRESPONDING BENEFITS

In 1980 the California Supreme Court decided the case of Tameny v. Atlantic Richfield Co.,/1/ holding that compensatory and punitive damages are available when employment is terminated for reasons which violate public policy. This decision was quickly followed by court of appeal decisions which broadly expanded the theories upon which wrongful discharge actions sounding in tort could be brought./2/ In 1982, it was held that punitive damages are available in employment discrimination cases under California's antidiscrimination law, the Fair Employment and Housing Act ("FEHA")./3/

1/ 27 Cal.3d 167, 254 Cal. Rptr. 211, 610 P.2d 1330 (1980).

2/ These included the landmark decisions in Cleary v. American Airlines, Inc., 116 Cal. App. 3d 311, 168 Cal. Rptr. 722 (1980) (recognizing a cause of action alleging a tortious breach of the implied covenant of good faith and fair dealing) and Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (recognizing a contract cause of action for breach of an implied-in-fact promise to terminate employment only for good cause).

3/ Commodore Home Systems, Inc. v. Superior Court, 32 Cal.3d 211, 185 Cal. Rptr. 270, 649 P.2d 912 (1982). Although the FEHA describes only equitable make-whole remedies, the California Supreme Court held that the FEHA does not limit available relief in the judicial as opposed to the administrative forum. The Court relied on the fact that at the time the FEHA was amended in 1977 to permit a private right of action, the Legislature was silent on the issue of remedy.

It is fair to say that these developments led to an immense increase in threatened and actual employment litigation as individuals and their attorneys responded to the irresistible lure of large jury verdicts including damages for pain and suffering and punitive damages. These verdicts have received a great deal of publicity, generating still more lawsuits in what has often been referred to as the other California lottery. It is interesting and apt to note the frequency with which references to gambling are made when discussing these tort lawsuits.

In the study of wrongful termination litigation published by the Rand Institute/4/, analyzing 120 jury trials in California from 1980 to 1986, the authors report that plaintiffs prevailed in 68 percent of the cases. The average verdict in cases in which plaintiffs prevailed was approximately $650,000; the median was $177,000./5/ Punitive damages were awarded in a large number of these cases. The Report itself summarizes its findings as follows:

> [J]uries decided in favor of plaintiffs in 81 of the 120 cases, or 67.5 percent. . . . The average award, including defense judgments, was $436,626. On

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4/ J. Dertouzos, E. Holland & P. Ebener, The Legal and Economic Consequences of Wrongful Termination (1988).

5/ Id. at 26, 39.

> average, about 60 percent of this total was compensation. However, one-third of all trials, or about one half of the plaintiff victories, resulted in punitive damages being awarded. The average award, excluding defense judgments, was $646,855. For these 40 trials, the average punitive damages award was $523,170. Of course, "expected" verdicts or trial averages are reduced by about one-third when defense victories are included./6/

That the risk, or promise, depending upon your perspective, of punitive damage assessments is very real is revealed by the incredible fact that these damages were awarded in half of the cases in which plaintiffs prevailed.

The availability of tort remedies and jury verdicts in the six and seven figures in employment wrongful termination cases has so pervaded the consciousness of California employers and employees that one federal judge noted the emergence of a "'disemployment industry' comprised of lawyers and personnel administrators whose sole job function is to assure that each and every termination of employment can be defended against later legal attack."/7/

Unpredictable and large jury verdicts continue to be awarded despite the cutback by the California Supreme

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6/ Id. at 25.

7/ Cox v. Resilient Flooring Div. of Congoleum Corp., 638 F. Supp. 726, 736 (C.D. Cal. 1986).

Court in *Foley v. Interactive Data Corp.* /8/ of the availability of tort damages in one type of wrongful termination case -- that alleging breach of the covenant of good faith and fair dealing. As reported in the most recent publication of the California Labor & Employment Law Quarterly, the official publication of the California State Bar Labor and Employment Law Section, 62 employment-related verdicts for plaintiffs have issued since December 1988 when *Foley* was decided./9/ The average verdict was $1,596,000 and the median was $405,000. As noted in the article, this median is significantly higher than the medians reported in the various pre-*Foley* studies including the Rand Report. Incredibly, twenty plaintiffs received verdicts of over $1 million; the five highest verdicts were: $45,376,000, $17,522,000, $2,468,000, $2,275,000, and $2,000,000.

These results may be attributable to the fact that the focus of employment litigation has changed since *Foley* with an increased emphasis on causes of action for wrongful discharges in violation of public policy and for

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8/ 47 Cal.3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988).

9/ A. Gomez, "Employment Trial Verdicts," *California Labor & Employment Law Quarterly*, Vol. 8, No. 4 (Winter 1991), pp. 16-17. The sources of information upon which the report is based are two verdict reporting services, a survey of members of the Labor and Employment Law Section of the State Bar, and other sources including direct reporting by attorneys.

employment discrimination, where compensatory and punitive damages remain available. Lawsuits premised on violation of public policy have resulted in the highest jury verdicts among the various types of wrongful discharge claims, even pre-Foley. In yet another study separately analyzing "public policy" or "retaliation cases" from January, 1979 to May, 1987, it was reported that the average jury award was $512,922 and the median award was $265,000./10/ The average compensatory damage award was $269,792 and the median award was $100,000. The punitive damage awards averaged $372,800, and the median was $251,250./11/ Employment discrimination cases are more similar in nature, of course, to wrongful termination public policy cases than to other types of wrongful termination cases. Indeed, in a further move toward transforming discrimination cases into tort cases, the California Supreme Court recently held that a wrongful termination cause of action could be stated for violation of the public policy against sex discrimination in employment and that it was not necessary for the plaintiff to proceed under the FEHA./12/

The conclusion is thus inescapable that the availability of tort damages has led to immense damage awards.

10/ D. Jung and R. Harkness, "The Facts of Wrongful Discharge," 4 The Labor Lawyer 257, 263 (1988).

11/ Id. at 264.

12/ Rojo v. Kliger, 52 Cal.3d 65, 276 Cal. Rptr. 130 (1990).

The cost to employers has been staggering when the cost of defending large numbers of lawsuits is added to the costs of inflated settlements attributable to the fear of an "out-of-control" jury verdict. Litigation is protracted due to the high stakes involved. It is generally recognized that fees for the defense of a relatively simple case will run at least $100,000 with costs increasing rapidly as the complexity of the case increases.

Moreover, employees in general have not necessarily benefited from these developments. In Foley, the California Supreme Court quoted Professor Gould of Stanford University as follows:

> Professor Gould asserts, "[t]he new common law of wrongful discharge has provided employer and employee with the worst of all possible worlds . . . . [E]mployers are subject to volatile and unpredictable juries that frequently act without regard to legal instructions. Moreover, the employees who benefit are few and far between, first, because of the difficulties involved in staying the course of a lengthy and expensive judicial process, and second, because of limitations inherent in the legal doctrines adopted by the courts." (Gould, . . . ["Stemming the Wrongful Discharge Tide: A Case for Arbitration" (1988), 13 Emp. Rel. L.J. 404, 413]).[13]

Other negative aspects of what is sometimes referred to as the "tortification" of employment law include the following:

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[13] 47 Cal.3d 654, 695-96.

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1. Cases Have Become Difficult to Resolve Expeditiously Through Settlement.

It has become increasingly difficult to settle both public policy wrongful termination and employment discrimination cases except at high dollar amounts. Pain and suffering damages are extremely difficult to quantify, particularly in the absence of physical injury, and it is virtually impossible to predict what a jury will award in punitive damages. The problem is compounded by the fact that plaintiffs often have unrealistic expectations. Even the administrative agency which enforces the FEHA, the Department of Fair Employment and Housing ("DFEH"), has frequently sought to conciliate cases by suggesting settlement amounts reflecting a tort damage component. As a result, a meeting of the minds concerning the value of a case for settlement purposes is often difficult to achieve. This is in sharp contrast to the ability to approximate potential liability based upon a make-whole remedy as a basis from which to discuss and reach settlement.

In Oki America, Inc. v. Microtech Intern., Inc., 872 F.2d 312, 315 (9th Cir. 1989), Circuit Judge Kozinski, concurring, decried the development of a new tort in the "Cloud Cuckooland" of modern tort theory, the bad faith denial of a contract, stating:

> Seaman's [the California Supreme Court case recognizing the new tort] throws kerosene on the litigation bonfire by holding out the allure of punitive damages, a golden carrot

> that entices into court parties who might otherwise be inclined to resolve their differences.

While not referring to the employment context, Judge Kozinski's comments are apposite in that context as well.

2. The Process of Conciliation Through the Administrative Agency Has Become Increasingly Adversarial.

In the employment discrimination context, the increasing number of plaintiffs who choose to litigate in court has resulted in the decreased ability of the DFEH to engage in the fact-finding necessary to conciliation. Employers necessarily carefully review statements made to the agency in light of the possibility that those statements will be used in future court litigation to support large damage awards and are understandably reluctant to admit that discrimination may have occurred. This is in contrast to the situation where the focus is remedial make-whole relief. In such a situation an employer has little reason not to freely admit that its conduct may have been improper, if such is the case, and quickly resolve the case. Because of the potential high stakes, lawyers are brought into cases at the earliest administrative stage.

The DFEH and the agency process is now regarded by many lawyers as merely an annoying but necessary procedural step which must be taken on the way to the courthouse.

3. The Resolution of Employment Disputes Is Delayed.

In California, it has not been uncommon for cases in the Superior Court system to take up to five years to be brought to trial as a result of increasingly congested dockets. This is in sharp contrast to an administrative process which focuses on the prompt resolution of disputes. If tort damages become available under Title VII, it can be anticipated that the already overburdened federal courts will experience an increase in the number of jury trials.

4. The Major Beneficiaries of Developments in California Have Been Attorneys.

Based upon the California experience, it can be expected that the group which will benefit the most if compensatory and punitive damages become available under Title VII will be attorneys. Incredibly, in the wrongful termination cases analyzed by the Rand Institute, less than half of the money which changed hands was received by the plaintiff. In cases resulting in plaintiff verdicts, the average final payment made (after allowing for appeals and settlements) was $307,628. However, of this amount the average contingency fee was $119,108, leaving a net payment of $188,520 to the plaintiff. When the average defense fee of $90,483 is added to the average plaintiff attorneys' contingency fee of $119,108, it reveals that, on average, the lawyers received $209,591 while the plaintiff received $188,520./14/

THE REPORTED STUDIES DO NOT REVEAL THE FULL IMPACT OF THE AVAILABILITY OF TORT DAMAGES

Even in cases of questionable merit, employers have been required to fund expensive and time-consuming litigation. While plaintiffs have not prevailed in every case and while the final jury verdict in every case has not been in six figures, the unpredictability of the process has forced employers to view each case as one which could potentially result in an extremely high or, especially in the case of smaller employers, ruinous verdict. Every case which is tried does not result in a large compensatory and punitive damage verdict, but virtually every complaint seeks such damages.

Moreover, many threatened wrongful termination cases are never filed in court. It is a common practice in California for a plaintiff's attorney to assert claims by letter, often including a copy of an unfiled complaint. The existence of these cases, if settled before filing, is not reflected in the studies.

14/ The Legal and Economic Consequences of Wrongful Termination, *supra*, p. 40.

Finally, employees who are performing poorly have frequently been retained by employers fearful of costly litigation. Indeed, it has been said that every termination is a potential liability event. Decreased productivity and the retention of marginal workers is certainly not a goal of the antidiscrimination laws.

PARTICULAR CONCERNS EXIST WITH RESPECT TO PUNITIVE DAMAGES

H.R. 1 authorizes the recovery of punitive damages in cases of intentional discrimination if the respondent "engaged in the unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others." A substantial risk exists that a jury will conclude that the standard for recovery of punitive damages is met in virtually every case of intentional discrimination because of the very nature of a finding of intentional discrimination. This argument has been advanced by plaintiffs in California.

The availability of punitive damages results in an inducement to litigation even when actual damages are quite small because of the possibility that a given jury may return a large verdict. As noted by one Fifth Circuit judge:

> One of the most unseemly features of our current legal system is its tendency to promote litigation as high-stakes gambling. A winner can gain the keys to the corporate treasury, if he has the good fortune to obtain the right lawyer, the right jury and

> the right forum. Punitive damages are a key feature of the abuse of the litigation process.[15]

CONCLUSION

In summary, I believe that the California experience provides valuable information about the potential negative consequences of the abandonment of the Title VII model which promotes expeditious and remedial relief in favor of an adversarial, individually-focused tort scheme. While I am in complete agreement with the principle that employment discrimination has no place in the workplace, I do not believe that making compensatory and punitive damages available is the appropriate way to advance that goal. Instead, I believe that the substantial negative effects would far outweigh the benefits of such a fundamental refocusing of the equal employment laws.

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[15] *Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414, 1422 (5th Cir. 1990), Judge Jones dissenting. It should also be noted that the constitutionality of punitive damages has become the focus of increased debate. While the Supreme Court has upheld the constitutionality of such damages against an Eighth Amendment challenge when the government has not prosecuted the action nor has any right to the damages awarded (*Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2902 (1989), it has the opportunity this term to address a due process challenge in *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279, argued October 3, 1990.

Chairman **Ford**. Professor Ross.

Professor **Ross**. Good afternoon. I'd like to thank the committee for inviting me to speak here on damages, and I'll try to be brief. I know it's getting very late in the afternoon.

I have had a 20-year history of experience, both as a litigator in Title VII cases, and as an academic writing and teaching in the field. And my background is summarized on the first page of my testimony.

The reasons why the Civil Rights Act of 1991 must provide for complete damages for intentional discrimination, in my view, can be briefly summarized in the terms, compensation, deterrence, justice, and the need to send an unequivocal message to the employers of this country that Congress considers discrimination against women workers to be just as reprehensible and just as illegal as other forms of discrimination.

Under the heading of compensation, the provision of make-whole relief to the victims of discrimination has been viewed as one of the two central purposes of Title VII since the Supreme Court's 1975 decision in the *Albemarle Paper Company* case. And another 1975 decision, *Johnson* v. *Railway Express*, made compensatory and punitive damages available to victims of racial discrimination in employment under 42 U.S.C. 1981. A subsequent decision clarified that victims of discrimination based on ancestry or ethnicity had the same compensatory and punitive damages remedies.

But make-whole relief fails in its central purpose if victims are not compensated for all forms of loss that they suffer. Prior to *Patterson*, women workers were the only large group of discrimination victims who could not recover for some of the losses they suffer as the result of discrimination. Those caused, for example, by medical bills, by emotional pain and suffering, by humiliation. Without adding a complete compensatory damage remedy to Title VII, they will continue to suffer these harms even if *Patterson* is overturned by this Congress.

Under the heading of deterrence, making victims whole for the discrimination they have suffered, is not the only purpose of damages. Punitive damages are equally needed to punish employers who engage in egregious discrimination. And a few well publicized cases of punitive damage awards should do much to motivate employers to scrutinize their employment practices closely, and to supervise their personnel effectively enough to prevent intentional discrimination,

Like the make-whole theory of relief, deterrence has long been accepted as a major goal of Title VII. Indeed, in the *Albemarle*, the Court spoke of the importance of deterrence in discussing the backpay remedy. And this is what it said: "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."

We have been hearing a debate today with defendants' lawyers saying, well, if we have damages, it will take away the incentive to settle, and plaintiff's attorneys saying the reverse. The Supreme Court, in 1975, came down on the side of saying financial compensation is needed to induce employers to enter into the settlement process.

I believe that that theory holds equally for the punitive damages remedy. Moreover, since many of the forms of discrimination women face entail little or no loss of wages, e.g., the repeated sexual assaults, that is, rapes, that were endured by Michelle Vinson while she stayed on the job, women often can seek only injunctive relief under Title VII as it is now written.

In footnote 3, on page 8 of my testimony, I have detailed some other examples of forms of discrimination that women commonly suffer, that do not entail much in the way of lost wages. For example, if you're forced off the job, while pregnant, for a few months, you lose a little bit of pay; not a whole lot. It's not an enormous back-pay remedy.

Similarly, if you lose some of your medical benefits, or your temporary disability benefits, while you are pregnant, because of pregnancy, the same thing. Or if you are denied a promotion to a job where you get valuable experience, but there is not much pay differential between the two jobs, again you are not going to lose much in the way of back wages. So, to give the employer a financial incentive to settle, I think punitive damages are important.

Under the heading of justice, the combined effect of Title VII and Section 1981—assuming *Patterson* is overturned by this body—is to give most Title VII victims of employment discrimination effective recourse to damages. That is the situation we have today. The only large group of Title VII victims left without this remedy is women. Simple justice dictates that this anomalous situation be ended by adding full compensatory and punitive damages to Title VII's set of remedies for intentional discrimination.

Finally, I'd like to speak to the need to send a clear message to employers. Women workers have long struggled against the idea that sex discrimination is somehow not as reprehensible or as illegal as other forms of discrimination. When Title VII was first enacted, there were jokes in the popular press about whether men could be Playboy bunnies. And the clear implication was that the law's sex discrimination coverage was not to be taken seriously. Employers got the message.

Instead of eliminating the host of explicit rules differentiating between men and women workers, they chose to defend them in court. The most egregious intentional discrimination—that set down in official, written, admitted, employer policies—was viewed as permissible if the victims were women workers. Thus, for years, women were forced to litigate what seemed like the most clear-cut cases, frequently all the way to the Supreme Court.

Cases that reached the Court included: a ban on hiring mothers, but not fathers, of preschool age children; a ban on hiring all women as prison guards; a policy of forcing pregnant women off the job; the exclusion of pregnant women from employer fringe benefit plans; paying women less than men for performing the same job; charging women higher premiums or paying them lower benefits for employment retirement plans, singling women out for repeated sexual attack on the job; and the currently pending case of refusing to hire all women because they might become pregnant.

If Congress considers and then rejects the addition of full damages to Title VII for intentional discrimination, it will be sending the wrong message to employers. Capping damages would also be sending the wrong message, for the reality would remain that damages would be capped only for women. Under 1981, blacks and other minority groups would continue to have the availability of punitive and compensatory damages.

Consequently, the message in either case would be that Congress believes discrimination against women workers to be less serious than other forms of discrimination. The history of employer resistance to equal treatment for women workers shows that they would be delighted to receive that message and to act on it.

I'd like to turn now to the arguments that have been raised by the defendants' bar against the inclusion of the damage remedy. And they are arguments that I think do not withstand scrutiny. One claim is that damages would undermine the conciliation system that all Title VII claimants must use, and would make the system more adversarial.

Again, there is no evidence to support this claim with regard to the majority of employment discrimination victims who have had access to both Title VII and Section 1981 remedies for over 15 years. We simply haven't seen this undermining of the conciliation process for minority workers, that people are worried about. And I'd also like to say it's a rather romantic view of the conciliation process.

The last 25 years demonstrate that the administrative conciliation often leaves many victims without redress. The EEOC is terribly overburdened. Conciliation rates now hover about 11 or 12 percent of cases filed. Delays are endemic. Ninety percent of all claims are not resolved by the administrative process.

Just to give you a little personal example, from my law students' experience, the EEOC found no cause in one of the cases they filed with the EEOC. They then took it to court, did full discovery, and settled on the eve of trial for $28,000 in back wages for a case in which the EEOC found no cause.

And as I said before, in terms of the damages remedy, I think it may actually enhance conciliation. Certainly that was the theory that the Supreme Court put forth in the *Albemarle* decision. And it's been borne out by experience under the Fair Housing amendments of 1988, which introduced the full damages remedy for cases of housing discrimination. And I believe the settlements have increased after the addition of the damages remedy.

Another defense bar claim is that the damages remedy will become an engine of litigation. Again, I don't see a shred of evidence that in Federal courts they are collapsing under the weight of combined Title VII–Section 1981 claims filed by minority plaintiffs.

The available evidence strongly suggests that litigation rates will not soar, and that awards will be modest and appropriate in scope. And in that regard, I am attaching a study done by the Washington, DC law firm of Shea & Gardner, at the request of the National Women's Law Center. And it reviews cases under Section 1981 from 1980 through the beginning of 1991.

I won't run through all their findings, but at the bottom of page 9, top of page 10, they find that in only 69 cases—this is over a ten-year period—that is about 11 percent of the total—did plaintiffs receive compensatory and/or punitive damages in Section 1981 cases.

That amounted to less than seven damage awards nationwide per year. And of those awards, only three were over $200,000.

The bottom line is thus hardly something which should engender fear in employers who do not intentionally discriminate against their employees.

Finally, lawyers for defendants rely on the California wrongful discharge case experience to suggest that Title VII damages will be astronomical and will undermine the enforcement of the statute. But the California experience, in my view, is quite irrelevant to Title VII. It is based on a set of laws entirely distinct in both purpose and scope from Title VII.

We do not have to turn to California's experience with another kind of lawsuit to determine how women workers would fear in seeking damages for employment discrimination, for we have the Shea & Gardner study of how minority workers have feared in exactly the same kind of lawsuit women would use, and in exactly the same court system.

Moreover, as Professor Eisenberg testified before this committee last year, 89 percent of the California wrongful discharge plaintiffs are white and 68 percent are male. The litigation experience of white males in California is not likely to be predictive of the litigation experience of female workers in another kind of lawsuit in a different court system.

In sum, the California experience with wrongful discharge cases benefitting white males, is simply irrelevant to the question before this committee of whether Title VII should include comprehensive and effective damages remedies so that women workers can gain the same damages remedies minority workers now have.

Thank you.

[The prepared statement of Professor Susan Deller Ross follows:]

TESTIMONY OF SUSAN DELLER ROSS,
PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER,
BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR,
IN SUPPORT OF H.R. 1, THE CIVIL RIGHTS ACT OF 1991
February 27, 1991

I would like to thank the Committee for inviting me here to address the issue of the damages remedy for intentional employment discrimination, proposed in Section 8 of H.R. 1, the Civil Rights Act of 1991. My background is that of one who has both litigated employment discrimination cases on behalf of women workers, and has also taught and written about the field, for over 20 years. My litigation background includes the prosecution of major class-action lawsuits while employed by the Equal Employment Opportunity Commission, the Civil Rights Division of the Justice Department, and the American Civil Liberties Union. At the ACLU, I also served as Co-Chair of the Campaign to End Discrimination Against Pregnant Workers, the coalition of civil rights and labor organizations that worked for passage of the Pregnancy Discrimination Act of 1978.

My academic background includes several publications addressing employment discrimination issues, including a law school casebook, Sex Discrimination and the Law: Causes and Remedies (with Barbara Babcock, Ann Freedman, and Eleanor Holmes Norton), another book entitled The Rights of Women, and several articles. I have also taught employment discrimination law in a number of law school courses, including a clinical course at Georgetown in which I have supervised other attorneys and students in the litigation of employment discrimination lawsuits on behalf of individual women workers.

The reasons why the Civil Rights Act of 1991 must provide for complete damages for intentional discrimination in Title VII suits can be briefly summarized. They include: compensation; deterrence; justice; and the need to send an unequivocal message to the employers of this country that Congress considers discrimination against women workers to be just as reprehensible and just as illegal as any other forms of discrimination.

1. Compensation

The provision of "make-whole" relief to the victims of employment discrimination has been viewed as one of the two central purposes of Title VII since the Supreme Court's 1975 decision in Albemarle Paper Co. v. Moody, 422 U.S. 405. Another 1975 decision, Johnson v. Railway Express, 421 U.S. 454, made compensatory (and punitive) damages available to victims of racial discrimination in employment under 42 U.S.C. §1981, and a subsequent decision clarified that victims of discrimination based on ancestry or ethnicity had the same remedies. Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987).

But make-whole relief fails in its central purpose if victims are not compensated for all forms of loss that they suffer. Prior to Patterson v. McLean Credit Union, 109 S. Ct. 2304 (1989), women workers were the only large group of discrimination victims who could not recover for some of the losses they suffered as a result of discrimination: those caused, for example, by medical bills, by emotional pain and suffering, by humiliation. Without adding a complete compensatory damages remedy to Title VII, women workers will continue to suffer these harms even if Patterson is overturned by this Congress.

Make-whole relief is indeed the correct response to the endemic discrimination women workers face, discrimination that leaves them still -- more than 25 years after enactment of the original Civil Rights Act -- earning only 68 cents for every dollar earned by a man. As the Supreme Court stated in justifying the make-whole concept:

> "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." [Citation omitted, emphasis added.] Albemarle, 422 U.S. at 418-419.

Without a provision in Title VII for complete compensatory damages for intentional discrimination, the compensation for women workers is not equal to the injury. It should be.

2. Deterrence

Making victims whole for the discrimination they have suffered is not the only purpose of damages. Punitive damages are equally needed to punish employers who engage in egregious discrimination. And a few well-publicized cases of punitive damage awards should do much to motivate employers to scrutinize their employment practices closely, and to supervise their personnel effectively enough to prevent intentional discrimination. Thus, punishment should result in deterring many other employers from engaging in discrimination.

Like the make-whole theory of relief, deterrence has long been accepted as a major goal of Title VII. Indeed, in Albemarle, the Court spoke of the importance of deterrence in discussing the back-pay remedy:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." [Citation omitted.] 422 U.S. at 417-418.

The theory holds equally for the punitive damages remedy. Moreover, since many of the forms of discrimination women face entail little or no loss of wages (e.g., the repeated sexual assaults endured by Michelle Vinson while she stayed on the job, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)), women often can seek only injunctive relief under Title VII as it is now written. This is precisely the situation which the Court defined as giving employers "little incentive to shun practices of dubious legality." Punitive damages are doubly important in these situations to give employers the needed incentive.

3. Justice

The combined effect of Title VII and Section 1981 (assuming Patterson is overturned by Congress) is to give most Title VII victims of employment discrimination effective recourse to damages. The only large group of Title VII victims left without this remedy is women.[1] Simple justice dictates that this anomalous situation be ended, by adding full compensatory and punitive damages to Title VII's set of remedies for intentional discrimination. This will change most Title VII lawsuits not at all, since African-American and other minority victims of discrimination can already combine Title VII and Section 1981 claims in one lawsuit. It will simply enable women workers to gain what other workers have already won.

4. Sending a Clear Message to Employers

Finally, the addition of compensatory and punitive damages is needed in order to send employers a clear message. Women workers have long struggled against the idea that sex discrimination is somehow not as reprehensible or as illegal as other forms of discrimination. When Title VII was first enacted, there were jokes in the popular press about whether men could be Playboy Bunnies; the clear implication was that the law's sex discrimination coverage was not to be taken seriously. Employers got the message. Instead of eliminating the host of explicit rules differentiating between men and women workers, they chose to defend them in court. The most egregious intentional discrimination -- that set down in official, written, admitted, employer policies -- was viewed as permissible, if the victims were women workers. Thus for years, women were forced to litigate what seemed like the most clearcut cases, frequently all the way to the Supreme Court. Cases that reached the Court included: a ban on hiring mothers, but not fathers, of preschool-age children (Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)); a ban on hiring all women as prison guards (Dothard v. Rawlinson, 433 U.S. 321 (1977)); a policy of forcing pregnant women off the job (Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)); the exclusion of pregnant women from employer fringe benefits plans (General Electric Co. v. Gilbert, 429 U.S. 125 (1976) and Nashville Gas Co. v. Satty, 434 U.S. 136 (1978)); paying women less than men for performing the same job (Corning Glass Works v. Brennan, 417 U.S. 188 (1974)); charging women higher premiums or paying them lower benefits for employment retirement plans (Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), and Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)); singling women out for repeated sexual attack on the job (Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986)); and (currently pending) refusing to hire all women because they might become pregnant (UAW v. Johnson Controls, Inc., 886 F. 2d 871 (7th Cir. 1989), cert. granted, 110 S.Ct. 1522 (1990)(No. 89-1215).

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[1] Those who have suffered discrimination based on their religion are also in this position. These cases constitute a tiny minority of all Title VII cases, however.

If Congress considers and then rejects the addition of full damages to Title VII for intentional discrimination, it will be sending the wrong message to employers. Capping damages would also send the wrong message, for the reality would remain that damages would be capped only for women. Consequently, the message in either case would be that Congress believes discrimination against women workers to be less serious than other forms of discrimination. The history of employer resistance to equal treatment for women workers shows they would be delighted to receive that message, and to act on it.

The right message is that Congress will not tolerate discrimination against women workers any more than it tolerates other forms of discrimination. Adding full compensatory and punitive damages to Title VII's remedies for intentional discrimination would send that message loud and clear.

Arguments raised by the defendants' bar against the inclusion of a damages remedy do not withstand scrutiny. One claim is that damages would undermine the conciliation system that all Title VII claimants must use, and would make the system more adversarial. Yet there is no evidence to support this claim with regard to the majority of employment discrimination victims who have had access to both Title VII and Section 1981 remedies for over 15 years.

This is also a rather romantic view of the conciliation process. The over twenty-five years of experience we have had with Title VII amply demonstrates that its emphasis on administrative conciliation leaves many bona fide discrimination victims without redress. The EEOC is enormously overburdened and is unable properly and timely to investigate and administratively resolve a high percentage of claims. Indeed, conciliation rates hover at about eleven or twelve percent of cases filed and delays are endemic. Virtually ninety percent of all claims are not

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resolved by the administrative process, a large proportion of which are plainly meritorious.[2] In short, painting an unduly rosy picture of a conciliation system which has such a low success rate offers no convincing reason to deny women damages.

Moreover, the inclusion of a damages remedy may actually enhance conciliation. Under current law, employers often have little potential backpay liability[3] and thus little incentive to settle cases. If their financial liability is increased, their incentive to settle may also increase, as the Supreme Court pointed out so convincingly in Albemarle. Early experience under the Fair Housing Amendments of 1988, which introduced a full damages remedy for cases of housing discrimination, supports this view, as it shows that settlements in the administrative proceedings increased after the addition of the damages remedy.

Another defense bar claim is that a damages remedy will become an "engine of litigation." Again, no one points to a shred of evidence that the federal courts are collapsing under the weight of combined Title VII-Section 1981 claims filed by minority plaintiffs. Indeed, the available evidence strongly suggests that litigation rates will not soar and that awards will be modest and appropriate in scope. In this regard, I am relying principally on the study done by the Washington, D.C. law firm of Shea & Gardner at the request of the National Women's Law Center, which I have attached to my testimony. That study reviews every reported case decided under Section 1981 from 1980 through the beginning of 1991. The Shea & Gardner findings include the following:

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[2] If I may offer just one example from the experience of my law students. The EEOC found "no cause" in the case of a woman counselor who was laid off by a school board for lack of federal funds, and then not considered for another opening due to a policy of seeking a male counselor to work with male students. After full discovery in federal court, however, the board settled the case on the eve of trial with an offer of full back pay of $28,000 to the counselor, plus attorneys' fees.

[3] In addition to the type of sexual harassment case where the woman has not lost her job (hostile environment sexual harassment), other typical cases might include being forced off the job for a few months of pregnancy, losing some or all of one's medical insurance or temporary disability benefits because of a restriction on pregnancy coverage, or being denied a promotion from one job to another where the pay difference was very little but the job experience was crucial. In all of these cases, the monetary cost for any individual woman would be insignificant for the employer.

1. There were only 594 reported cases nationwide, during this period.

2. Plaintiffs lost over half (325 or 54.7%) of these cases.

3. The resolution of another quarter of the cases (24.9%) cannot be determined.

4. Plaintiffs succeeded in proving intentional discrimination in the remaining 121 cases (20.3% of the total).

5. But even here, in nearly half of the plaintiff victories (52 cases or 8.7% of the total), plaintiffs received only the equitable remedies which would have been available under the current Title VII remedial scheme.

6. Only in 69 cases (11.6% of the total) did plaintiffs receive compensatory and/or punitive damages. This amounts to less than 7 damages awards, nationwide, per year.

7. Of those awards, only three are over $200,000. One of those three is currently on appeal in the Fourth Circuit Court of Appeals.

The bottom line is thus hardly something which should engender fear in employers who do not intentionally discriminate against their employees. The study also undermines the argument that the availability of damages for women workers will create a "lawyer's bonanza," enticing attorneys into this field in the hope of winning large contingent fees. Obviously, there is no fee if the attorney does not win the case, and the Shea & Gardner study shows us that plaintiffs lose more than half the cases. Indeed, damages are awarded in only 11.6% of the cases overall. Aside from these extremely unfavorable odds, the sizes of the awards are far too small to support contingent fees larger than those that would be available under the current Title VII fee-setting provisions. It thus seems highly unlikely that the damages remedy for women workers will attract hordes of new lawyers. Rather, it seems likely that victims will continue to encounter the enormous problems they currently face in finding counsel to take their claims to court.

Finally, lawyers for defendants rely on the California wrongful discharge case experience to suggest that Title VII damages will be astronomical and will undermine the enforcement of the statute. But the California experience is quite irrelevant to Title VII. It is based on a set of laws entirely distinct in both purpose and scope from Title VII. We do not have to turn to California's experience with another kind of lawsuit to determine how women workers would fare in seeking damages for employment discrimination. For we have Shea & Gardner's study of how minority workers have fared in exactly the same kind of lawsuit women would use, and in exactly the same court system. Moreover, as Prof. Eisenberg testified before this Committee last year, 89.3% of the California wrongful discharge plaintiffs are white, and 68.6% are male. The litigation experience of white males in California is not likely to be predictive of the litigation experience of female workers in another kind of lawsuit and a different court system. In sum, the California experience with wrongful discharge cases benefitting white males is simply irrelevant to the question before this Committee of whether Title VII should include comprehensive and effective damages remedies, so that women workers can gain the same damages remedies minority workers now have.

ANALYSIS OF DAMAGE AWARDS UNDER SECTION 1981

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INTRODUCTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). Employees who succeed on a Title VII claim are entitled to equitable relief including back and front pay, reinstatement, instatement, injunctive relief and attorney fees. 42 U.S.C. § 2000e-5(g) and (k). Successful Title VII employees cannot, however, receive compensation for consequential damages for injuries resulting from the discrimination, such as medical expenses, nor are they entitled to punitive damages.

Employees also are protected from intentional employment discrimination on the basis of race under 42 U.S.C. § 1981 (1988). In addition to equitable relief, Section 1981 awards compensatory and punitive damages. Thus, if an employee sues under both Title VII and Section 1981, compensatory and punitive damages would be available. Because, however, Section 1981 does not prohibit employment discrimination on all of the bases protected under Title VII, such as sex, even where an employer intentionally engages in unlawful sex discrimination, an employee is not entitled to compensatory or punitive damages.

In 1990, Congress considered, but ultimately did not pass, legislation entitled "The Civil Rights Act of 1990," S.2140/H.R.4000, 101st Cong., 2d Sess. (1990) (the 1990 Act). The purpose of the 1990 Act was to "amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment ..." Preamble to the 1990 Act. In Title VII cases involving *intentional* discrimination, Section 8 of the 1990 Act states that compensatory damages may be awarded and, if an employer engages in an "unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded."

Legislation, including a damages provision similar to that in the original version of the 1990 Act, has been introduced in Congress in 1991. See H.R. 1, 102nd Cong., 1st Sess. (1991) (hereinafter "the 1991 Act").

The 1990 and 1991 Civil Rights Acts provide that remedies available to Title VII plaintiffs are equivalent to the remedies which are available to employees who sue under Section 1981. When looking at liability, courts already have held that, "[w]hen 42 U.S.C. §1981 and Title VII are alleged as parallel bases of relief, the same elements of proof are required for both actions." Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231, 1233-34 (5th Cir. 1989). Thus, since the standard for proving intentional discrimination would be the same for Section 1981 and Title VII, by examining damages which have been awarded in Section 1981 employment discrimination cases, it is possible to forecast the types of awards which would be rendered if Congress passes the 1991 Act.

We have reviewed Section 1981 employment discrimination claims reported since January 1, 1980 in West's Federal Reporter and Federal Supplement, BNA's Fair Employment Practice Cases, or in CCH's Employment Practices Decisions. In short, using the Section 1981 experience as a guide our research shows that, if Congress passes the 1991 Act:

(1) Most plaintiffs' claims for damages will fail for procedural or substantive reasons;

(2) Of those plaintiffs who do prevail, many will receive only equitable relief, which currently is available under Title VII;

(3) When a plaintiff does receive compensatory or punitive damages, the award will probably be moderate;

(4) If an employer engages in outrageous intentional discrimination, in a few cases the plaintiff may receive a more substantial compensatory or punitive damages award; and

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(5) If either a jury or court awards excessive compensatory or punitive damages, the award may well be reduced or reversed on appeal.

DISCUSSION

Our research included a total of 594 reported cases decided between 1980 and 1990.[1] Of these cases, 148 apparently settled after the reported decisions, or were reversed or remanded, and no further information was available. In 325 cases, the claims either were dismissed before trial or a court or jury ruled that the plaintiff was not entitled to relief under Section 1981.

In the 121 remaining cases, the plaintiff proved that the employer intentionally engaged in unlawful racial discrimination. In 52 of these cases, however, plaintiffs did not receive any compensatory relief or punitive damages. Rather, the plaintiff received only back pay, front pay or other equitable remedies comparable to those currently available under Title VII. See Appendix B for a list of these cases. In many of these cases, compensatory or punitive damages were not awarded because the court specifically concluded that the remedies afforded under Title VII were sufficient to make the plaintiff whole for the damage suffered. See e.g., Walsdorf v. Board of Commissioners for the East Jefferson Levee District, 857 F.2d 1047, 1054 (5th Cir. 1988). Thus, because it is likely that Title VII plaintiffs will have experiences similar to Section 1981 plaintiffs, even if the 1991 Act is passed, our research demonstrates that, in a substantial number of cases, courts will continue to award only equitable relief.

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[1] Because we limited our research to reported decisions, this study does not discuss cases that settled without any reported decision.

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From 1980 to the present, our research found that plaintiffs were awarded compensatory or punitive damages in 69 cases involving 92 claims.[2] Of the 66 claims where it is possible to determine the exact amount of the award,[3] 42 of the combined compensatory and punitive damages awards were $50,000.00 or less. See Appendix A. In fact, in four cases, plaintiffs received nominal awards of less than $500.00.

Of the cases we reviewed, a plaintiff was ultimately awarded in excess of $200,000.00 in compensatory and/or punitive damages in only three cases. In Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987), the Court of Appeals affirmed the $123,000.00 compensatory damages award noting that the defendant had discriminated against the plaintiff for over ten years, then terminated the plaintiff for "disloyalty" after he filed a discrimination claim with the New Hampshire Commission of Human Rights. 832 F.2d at 197. While the court felt that the punitive damages award needed to be substantial because of Anheuser-Busch's size, it reduced the punitive damage award to $300,000.00 from $3 million. Similarly, the plaintiff in Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985), received $500,000.00 punitive damages award against General Motors Corporation (GM). The plaintiff, the first Equal Employment Opportunity Coordinator at one of GM's California plants, was fired solely because of his efforts to protect the rights of minority employees. Finally, in Holland v. First Virginia Banks, Inc., 744 F. Supp. 722 (E.D. Va. 1990), a jury awarded the plaintiff $20,000 in compensatory damages and $500,000 in punitive damages against the First Virginia Bank and $1,000 against the individual defendant in a hostile work environment case where the plaintiff was fired after he filed a complaint with the Equal Employment Opportunity Commission.

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[2] Some of the cases had more than one plaintiff.

[3] Because some of the awards combined back pay and compensatory damages and because many of the trials were bifurcated or the damages was calculated later, we were unable to ascertain the amount of damages awarded in all cases

Our research found five cases over the past ten years where judges or juries awarded substantial compensatory or punitive damages that were later found to be unwarranted. See Appendix C for a list of these cases. On appeal, these awards were either reduced or the entire case was reversed because of the amount of the award. For example, in Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989), the Court of Appeals affirmed the district court's determination that all of the damages awarded by the jury were excessive and that the defendant was entitled to a new trial. While the Court of Appeals affirmed the compensatory damages award in Stephens v. South Atlantic Canner, Inc., 848 F.2d 484 (4th Cir. 1988), it held that the evidence did not support the punitive damages award. See also Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985); Rodgers v. Fisher Body Division, 739 F.2d 1102 (6th Cir. 1984); Rowlett v. Anheuser-Busch Inc., 832 F.2d 194 (1st Cir. 1987). These cases indicate that if a jury or a court awards excessive compensatory or punitive damages, the award can be corrected by a trial or appeals court.[4]

CONCLUSION

Our research demonstrates that, since 1980, victims of intentional employment discrimination have not received excessive damage awards under

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[4] In McKnight v. General Motors Corporation, 705 F. Supp. 464 (E.D. Wis. 1989), the plaintiff was originally awarded $500,000.00 in punitive damages because the defendant fired him after he filed valid racial discrimination complaints. On appeal, the Seventh Circuit Court of Appeals set aside that award on the ground that the Section 1981 claim did not survive the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) McKnight v. General Motors Corporation, 908 F.2d 104 (1990).

42 U.S.C. § 1981. Since courts use the same standards to examine intentional discrimination claims under Section 1981 and Title VII, we believe that the types of relief afforded in Section 1981 claims accurately reflect relief that would be awarded under the Civil Rights Act of 1991. Using the Section 1981 experience as a guide, our research shows that, if Congress passes the 1991 Act, most plaintiffs will receive neither compensatory nor punitive damages. Even if an employee proves that the employer engaged in intentional discrimination, unless an employer has engaged in outrageous, intentional conduct, compensatory and punitive damages awards will be moderate. Finally, if a judge or jury awards "excessive" damages, the award will be modified by another court.

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APPENDIX A

Section 1981 Cases In Which
Compensatory and/or Punitive
Damages Were Awarded: 1980-Present
Total - 68

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
7/20/90	*Holland* v. *First Virginia Banks, Inc.*, 744 F. Supp. 722 (E.D. Va. 1990)			$20,000.00	$501,000.00	
4/16/90	*Hicks* v. *Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990)			$10,000.00		$1 (nominal damages); $18,562.50 (attorneys' fees); $2,189.00 (costs)
11/21/89	*Jackson* v. *City of Albuquerque*, 890 F.2d 225 (10th Cir. 1989)	Amount not reported	$50,000.00	$70,000.00	$70,000.00	Reinstatement
7/14/89	*Gillespie* v. *First Interstate Bank of Wisconsin Southeast*, 717 F. Supp. 649 (E.D. Wis. 1989)	$20,936.92 (plus prejudgment interest)		$50,000.00	$60,000.00 (district court reduced jury award of $100,000.00 as excessive)	
7/13/89	*Flanagan* v. *Aaron E. Henry Community Health Services Center*, 876 F.2d 1231 (5th Cir. 1989)			$50,000.00	$20,000.00	
6/5/89	*Bempah* v. *Kroger Co.*, 51 FEP Cases 195 (S.D. Ga. 1989)	$1,731.00		$7,200.00		
3/16/89	*Johnson* v. *Philadelphia Electric Co.*, 709 F. Supp. 98 (E.D. Pa. 1989)	Amount not reported	Amount not reported	$10,000.00		
2/28/89	*Jackson* v. *Pool Mortgage Company*, 868 F.2d 1178 (10th Cir. 1989)	$49,725.00		$24,421.00		
2/2/89	*Hopper* v. *Euclid Manor Nursing Home*, 867 F.2d 291 (6th Cir. 1989)	-				$100.00

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Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/30/89	Carter v. Sedgwick County, Kansas, 705 F. Supp. 1474 (D. Kan. 1988)	$10,748.05	Yes or reinstatement	$100,000.00	$10,000.00	
11/25/88	Erebia v. Crysler Plastic Products Corp., 863 F.2d 47 (table) (6th Cir. 1988) (Erebia II)	$1.00		$75,000.00	$55,000.00	Reversed to resolve issue of reinstatement
9/2/88	Edwards v. Jewish Hospital of St. Louis, 855 F.2d 1345 (8th Cir. 1988)			$1.00	$25,000.00	
7/22/88	Cowan v. Prudential Insurance Co. of America 852 F.2d 688 (2d Cir. 1988)			$15,000.00		
6/7/88	Hernandez v. Hill Country Telephone Cooperative, Inc., 849 F.2d 139 (5th Cir. 1988)			$5,000.00		
4/25/88	Few v. Yellow Freight System, Inc., 845 F.2d 123 (6th Cir. 1988)			$10,000.00	$5,000.00	
4/12/88	Zaklama v. Mt. Sinai Medical Center, 842 F.2d 291 (11th Cir. 1988)			$85,000.00	$50,000.00	
4/11/88	Wade v. Orange County Sheriff's Office, 844 F.2d 951 (2d Cir. 1988)	$2,100.00		$50,000.00		"Out-of-pocket loss" $2,000.00
12/8/87	Reeder-Baker v. Lincoln National Corporation, 834 F.2d 1373 (7th Cir. 1987)	$25,665.49	$26,760.00	$10,000.00	$25,000.00	Prejudgment Interest - $1,043.76
9/30/87	Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987)	$176,000.00		$123,000.00	$300,000.00 (First Circuit reduced jury award of $3 million as excessive)	

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/11/87	*Collins* v. *Illinois*, 830 F.2d 692 (7th Cir. 1987)			Remanded to acertain the amount		
8/24/87	*Richards* v. *New York City Board of Education*, 668 F. Supp. 259 (S.D.N.Y. 1987), *aff'd w/out opinion*, 842 F.2d 1289 (2d Cir. 1988)	Not reported		$15,000.00		Promotion to next available position of commensurate responsibility & pay
8/13/87	*Marsh* v. *Digital Equipment Corp.*, 675 F. Supp. 1186 (D. Ariz. 1987)	$34,642.45 (plus prejudgment interest)		$15,000.00	$50,000.00	
5/20/87	*Wyatt* v. *Security Inn Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir. 1987) [three plaintiffs]			$1.00 $1.00 $1.00	$15,000.00 $15,000.00 $15,000.00	
5/4/87	*Williamson* v. *Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987)	$130,000.00 (May include future earnings)		$20,000.00	$100,000.00	
4/2/87	*Johnson* v. *Armored Transport of California, Inc.*, 813 F.2d 1041 (9th Cir. 1987)			$45,000.00	$150,000.00 (plaintiff agreed to reduce jury award from $250,000.00 rather than face a new trial)	
1/26/87	*Brown* v. *Freedman Baking Co.*, 810 F.2d 6 (1st Cir. 1987) [three plaintiffs]	$22,000.00 $ 4,000.00 $ 1,000.00			$53,000.00 $54,000.00 $54,000.00	
11/10/86	*Walters* v. *City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986)			$150,000.00	$2,000.00	Instatement

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
7/30/86	*Hunter* v. *Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986)	Amount not reported		$25,000.00	$25,000.00	
6/16/86	*Boyd* v. *SCM Allied Paper Co.*, 42 FEP Cases 1643 (N.D. Ind. 1986)	$17,615.34	(To be paid if immediate reinstatement impossible)	$5,000.00		Reinstatement; $3,226.19 (prejudgment interest)
6/9/86	*Wilmington* v. *J.I. Case Co.*, 793 F.2d 909 (8th Cir. 1986)	Jury awarded $400,000.00 in "actual damages" to include back pay, future earnings and emotional distress			$40,000.00	Future earnings
4/23/86	*Yarbrough* v. *Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986)			$29,500.00 (May include back pay)	$7,500.00	
12/11/85	*Stallworth* v. *Shuler*, 777 F.2d 1431 (11th Cir. 1985)			$100,000.00	$1,000.00	
10/23/85	*Anderson* v. *Group Hospitalization, Inc.*, 621 F. Supp. 943 (D.D.C. 1985), *aff'd in relevant part*, 820 F.2d 465 (D.C. Cir. 1987)			$100,000.00 (includes back pay)		Reinstatement, injunction against further discrimination
10/21/85	*Moffett* v. *Gene B. Glick Co.*, 621 F. Supp. 244 (N.D. Ind. 1985)	$10,895.00		$66,640.00	$15,000.00	Corporate defendant entitled to $50,000.00 credit which represents settlement amount with individual defendants; $1,275.24 (interest)

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/17/85	Foster v. MCI Telecommunications Corp., 773 F.2d 1116 (10th Cir. 1985)	Amount not reported		$50,000 00		
8/30/85	Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303 (7th Cir. 1985)	$37,486 00		$35,000 00 (Seventh Circuit reduced award from $75,000 00)	$20,000 00 (Seventh Circuit reduced award from $150,000)	
7/9/85	Rosemond v. Cooper Industrial Products, 612 F Supp. 1105 N.D. Ind. 1985)	$8,550 02		$500 00		Employment rec. expunged
6/7/85	Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985) (Erebia I)			Nominal ($10,000 00 award vacated.)	$30,000 00	
6/6/85	Alston v. Blue Cross, 37 FEP Cases 1792 (E.D.N.Y. 1985)	$17,422.00 (includes prejudgment interest)	$36,658.00 (includes prejudgment interest)	$90,000 00		
4/16/85	Grubb v. W.A. Foote Memorial Hosp., Inc., 759 F.2d 546 (6th Cir. 1985)	$57,689 60	Amount not reported	$25,000 00		$1,560 00 (out of pocket expenses), $19,758 59 (Interest), Reinstatement
3/22/85	Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985) [three plaintiffs]	Amount not reported		$500 00		
1/21/85	Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985)	$30,000 00		$20,000 00	$500,000 00	
10/4/84	Easley v. Northern Shipping Co., 597 F. Supp. 954 (E.D. Pa. 1984)	$2,862 70		$1 00		

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Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/27/84	Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984)			$10,000.00		
7/13/84	Rodgers v. Fisher Body Div., 739 F.2d 1102 (6th Cir. 1984)			(Sixth Circuit vacated $300,000.00 award as excessive)	(Sixth Circuit vacated $500,000.00 award as excessive)	
6/27/84	Poolaw v. City of Anadarko, Okl., 738 F.2d 364 (10th Cir. 1984)					Actual damages $10,000.00 (This amount m include back p
5/2/84	EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984)			$18,225.00 (This amount includes back pay & punitive damages)		
4/18/84	Dickerson v. City Bank & Trust Co., 46 FEP Cases (1313 (D. Kan. 1984)			$2,145.00 (may include back pay)	$10,000.00	
4/5/84	EEOC v. Inland Marine Industries, 729 F.2d 1229 (9th Cir. 1984)	$268.85		$500.00		
2/21/84	Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984)	$72,355.20		$52,644.80		
2/17/84	Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984)			$10,000.00 (This amount includes back pay)		
1/9/94	Gates v. ITT Continental Baking Co., 581 F. Supp. 204 (N.D. Ohio 1984)	$51,877.00		$35,000.00		Reinstatement, fringe benefits

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
10/28/83	Poindexter v. Kansas City, Missouri Water Dept., 573 F. Supp. 647 (W.D. Mo. 1983), aff'd w/out opinion, 734 F.2d 377 (8th Cir. 1984)	Amount not reported		Amount not reported	Amount not reported	
8/26/83	Goldsmith v. E.I. du Pont de Nemours & Co., 571 F. Supp. 235 (D. Del. 1983)			$10,000.00		
8/22/83	Jackson v. Wakulla Springs & Lodge, 33 FEP Cases 1301 (N.D. Fla. 1983) [five plaintiffs]	$14,719.90 $10,854.00 $14,070.00 $ 7,822.55 $ 6,786.80		$3,000.00 $5,000.00 $3,000.00 $3,000.00 $5,000.00	$5,000.00 $5,000.00 $5,000.00 $5,000.00 $5,000.00	
7/19/83	Block v. R.H. Macy & Co., 712 F.2d 1241 (8th Cir. 1983)	$7,598.00		$12,402.00	$60,000.00	
11/22/82	Cooper v. Department of Administration, State of Nevada, 558 F. Supp. 244 (D. Nev. 1982)			$10,000.00		
9/23/82	Irving v. Dubuque Packing Co., 689 F.2d 170 (10th Cir. 1982)			$20,000.00		
5/28/82	Metrocare v. Washington Metropolitan Area Transit Authority, 679 F.2d 922 (D.C. Cir. 1982) [four plaintiffs]	Amount not reported (District of Columbia Circuit reinstated unspecified jury verdicts for four individual plaintiffs)		Amount not reported		

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Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
11/20/81	Amup v. Wade, 28 FEP Cases 1065 (C.D. Ca. 1981) [seven plaintiffs]			Amount not reported		
11/19/81	Acosta v. University of the District of Columbia, 528 F. Supp. 1215 (D.D.C. 1981)			$7,500.00 (may include back or front pay)		
10/2/81	Williams v. Trans World Airlines, 660 F.2d 1267 (8th Cir. 1981)			Amount not reported	Reinstatement	
9/30/81	Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) [three plaintiffs]			$15,050.00 $ 3,550.00		
6/17/81	Lehman v. Yellow Freight Systems, Inc., 651 F.2d 520 (7th Cir. 1981)			Amount not reported	Reinstatement; retroactive seniority	
5/31/81	Reese v. Batesville Casket Co., 25 FEP Cases 1472 (D.D.C. 1981) [two plaintiffs]			$240,000.00 (includes loss of future earings) $60,000.00		
1/26/81	Richardson v. Restaurant Marketing Associates, 527 F. Supp. 690 (N.D. Cal. 1981) [two plaintiffs]	Amount not reported		$10,000.00 $10,000.00		
12/5/80	Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341 (8th Cir. 1980) [class action]			$16,854.00		
8/18/80	Fisher v. Dillard University, 499 F. Supp. 525 (E.D. La. 1980)	$11,127.00 (plus pre-judgment interest)		$50,000.00	$10,000.00	

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
2/25/80	*Crawford* v. *Roadway Express, Inc.*, 485 F. Supp. 914 (W.D. Ga. 1980)	$17,015.55		$26,793.00		

APPENDIX B

Cases Where Plaintiff Prevailed on Section 1981 Claim But Neither Compensatory Nor Punitive Damages Were Awarded

Total = 52

Abron v. Black & Decker (US) Inc., 654 F.2d 951 (4th Cir. 1981)

Albright v. Longview Police Dept., 884 F.2d 835 (5th Cir. 1989)

Bennun v. Rutgers, 737 F. Supp. 1393 (D.N.J. 1990)

Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395, supplemented by, 852 F.2d 621 (D.C. Cir. 1988)

Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (4th Cir. 1985)

Bridgeport Guardians, Inc. v. Delmonte, 553 F. Supp. 601 (D. Conn. 1982)

Briseno v. Central Technical Community College Area, 739 F.2d 344 (8th Cir. 1984)

Brown v. Eckerd Drugs, Inc., 564 F. Supp. 1440 (D. N.C. 1983)

Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986)

Calloway v. Westinghouse Electric Corp., 642 F. Supp. 663 (M.D. Ga. 1986)

Cunico v. Pueblo School Dist. No. 60, 693 F. Supp. 954, supplemented by 705 F.Supp. 1466 (D. Colo. 1988)

Dacus v. Southern College of Optometry, 657 F.2d 81 (6th Cir. 1981)

Dougherty v. Barry, 869 F.2d 605 (D.C. Cir. 1989)

Eddins v. West Georgia Medical Center, Inc., 629 F. Supp. 753, supplemented by, 39 F.E.P.C. 1499 (N.D. Ga. 1985), aff'd in part without opinion, 795 F.2d 88 (11th Cir. 1986)

Figgs v. Quick Fill Corp., 766 F.2d 901 (5th Cir. 1985)

Freeman v. Michigan Dept. of State, 808 F.2d 1174 (6th Cir. 1987)

Freeman v. Motor Convoy, Inc., 700 F.2d 1339 (11th Cir. 1983)

Gilbert v. City of Little Rock, 867 F.2d 1063 (8th Cir. 1989)

Goodlett v. *Rhodes Furniture Co.*, 26 F.E.P.C. 1400 (N.D. Ga. 1981)

Grant v. *Bethlehem Steel Corp.*, 622 F.2d 43 (2d Cir. 1980)

Gunby v. *Pennsylvania Elec. Co.*, 840 F.2d 1108 (3d Cir. 1988)

Hameed v. *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506 (8th Cir. 1980)

Hamilton v. *Rodgers*, 791 F.2d 439 (5th Cir. 1986)

Harris v. *Richards Mfg. Co.*, 675 F.2d 811 (6th Cir. 1982)

Haynes v. *Miller*, 669 F.2d 1125 (6th Cir. 1982)

Heard v. *Golden Flake Snack Foods, Inc.*, 652 F. Supp. 282 (N.D. Ala. 1986), *aff'd without opinion*, 834 F.2d 1027 (11th Cir. 1987)

Jackson v. *McCleod*, 748 F. Supp. 831 (S.D. Ala. 1990)

Jackson v. *Missouri Pacific R. Co.*, 803 F.2d 401 (8th Cir. 1986)

Johnson v. *Chapel Hill Independent School Dist.*, 853 F.2d 375 (5th Cir. 1988)

Lilly v. *Harris-Teeter Supermarket*, 842 F.2d 1496 (4th Cir. 1988)

Louisville Black Police Officers Org. v. *City of Louisville*, 700 F.2d 268 (6th Cir. 1983)

Marks v. *Prattco, Inc.*, 633 F.2d 1122 (5th Cir. 1981)

McAlester v. *United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988)

Mitchell v. *USAir, Inc.*, 629 F. Supp. 636 (N.D. Ohio 1986)

N.A.A.C.P. v. *City of Evergreen, Ala.*, 693 F.2d 1367 (11th Cir. 1982)

Padilla v. *United Air lines*, 716 F. Supp. 485 (D. Colo. 1989)

Payne v. *Travenol Labs., Inc.*, 673 F.2d 798 (5th Cir. 1982)

Roman v. *Niagara Frontier Transit Metro System, Inc.*, 30 F.E.P.C. 1345 (D. Colo. 1983)

Royal v. *Bethlehem Steel Corp.*, 636 F. Supp. 833 (E.D. Tex. 1986)

Satterwhite v. *Smith*, 744 F.2d 1380 (9th Cir. 1984)

Savage v. *McAvoy*, 26 F.E.P.C. 114 (S.D. Ohio 1980)

Scroggins v. *Kansas*, 802 F.2d 1289 (10th Cir. 1986)

Skinner v. *Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988)

Smith v. *American Service Co. of Atlanta, Inc.*, 611 F. Supp. 321 (N.D. Ga. 1984)

Spiva v. *Copperweld Steel Co.*, 22 F.E.P.C. 900 (N.D. Ohio 1980)

Taylor v. *Jones*, 653 F.2d 1193 (8th Cir. 1981)

Walsdorf v. *Board of Commissioners for the East Jefferson Levee District*, 857 F.2d 1047 (5th Cir. 1988)

Weatherspoon v. *Andrews & Co.*, 32 F.E.P.C. 1226 (D. Colo. 1983)

Whatley v. *Skaggs Companies, Inc.*, 707 F.2d 1129 (10th Cir. 1983)

Whiting v. *Jackson State University*, 616 F.2d 116 (5th Cir. 1980)

Williams v. *Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982)

Wilmington Firefighters Local 1590 v. *City of Wilmington*, 40 E.P.D. ¶ 36, 361 (D. Del. 1986)

APPENDIX C

Cases Where Section 1981 Damages Were Reversed as Excessive Total = 5

Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985)	Court of appeals reduced $75,000.00 compensatory damage award to $35,000.00 and reduced $150,000.00 punitive damage award to $20,000.00.
Rodgers v. Fisher Body Division, 739 F.2d 1102 (6th Cir. 1984)	Court of appeals remanded for trial solely on the issue of damages. The jury originally awarded $300,000.00 in compensatory damages and $500,000.00 in punitive damages.
Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987)	Court of appeals affirmed $123,000.00 award for emotional distress but reduced the $3 million punitive damage award to $300,000.00.
Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503 (11th Cir. 1989)	Court of appeals remanded for a new trial because it found the following awards to be excessive: the jury award of $42,000.00 in back pay; $500,000.00 in front pay; and, $2.5 million punitive damage award.
Stephens v. South Atlantic Canners, Inc., 848 F.2d 484 (4th Cir. 1988)	Court of appeals remanded for a new trial. The jury originally awarded $100,000.00 in compensatory damages and $85,000.00 in punitive damages.

APPENDIX D

Summary of Cases Researched

Total Number of Cases Researched:	594
Total Number of Cases In Which 1981 Claim Was Dismissed or Plaintiff Lost at Trial:	325
Total Number of Cases Where the Disposition is Unknown:	148
Total Number of Cases Where Plaintiff Proved Intentional Discrimination:	121
Total Number of Cases Where Plaintiff Recovered Only Equitable Relief:	52
Total Number of Cases Where Plaintiff Received Compensatory Relief or Punitive Damanges:	69

Chairman **Ford**. Thank you very much.

Mr. Fasman, at the beginning of your testimony, you went to great lengths, and I was impressed, because I think it's consistent with my opinion of the National Association of Manufacturers' stated policy, when you talked about how they abhor any kind of racial or gender-based discrimination. You indicated that, however, you were speaking for them when you spoke against permitting women, complaining of sex discrimination, to collect monetary damages beyond pay.

Ms. Hemminger, you indicated, after you got close to the end of your testimony, you were speaking for no one but yourself, in spite of the fact that Gibson, Dunn and Crutcher have a reputation that stretches all the way over to the East Coast. They didn't really want you to come here. This is just your own opinion. And that you abhor discrimination.

But that if we were to extend, consistent with what Mr. Fasman, said, and then Ms. Burns, behind you, if we were to extend the damages that are now extended to race discrimination cases, to sex discrimination cases—if I followed the reasoning that you were giving us—we would undermine the entire process to the point where we would keep everybody in court, we would never get remedies for women; and in fact, we would be doing harm to women who were victims, or alleged victims, of sex discrimination.

Is that really your view? Is that what you meant to tell me?

Mr. **Fasman**. Well, I'll be happy to start off. I think that's what I heard my compatriot say. As a practitioner in this area, I truly believe that if you enhance remedies in this way, what will happen is that the incentive to settle at the conciliation process early in the case will be destroyed, and that you will be forcing many, more cases into the Federal courts.

Chairman **Ford**. Anybody else at the table agree with that statement?

Ms. **Burns**. That is exactly what I intended to say with respect to the Michigan experience, that the availability of huge, potential damages has, I think, made it difficult to resolve employment problems promptly, and that if one believes that that is the fundamental purpose of Title VII, that the proposed additional remedies will do serious damage to that purpose of quick resolution, yes.

Chairman **Ford**. Well, now, as a lawyer you give me a catch-22 sort of situation to deal with. I would like to support this legislation, but if in fact I follow the rationale of your reasoning, affording these potential damage awards as a remedy to women would act against their best interest, what we really should be considering is repealing that remedy for race discrimination cases; should we not? Has it had that effect on race discrimination?

Susan Ross says no, that's not what has happened with race discrimination cases. No, it hasn't interfered with conciliation and settlements.

You all three suggest, by the reasoning that you have presented to this committee, that your primary concern is not to permit anybody to discriminate against anyone, but that in fact you would discourage people from doing "the right thing" by people who are perceived are actual victims.

Now, if that's the case, does anyone at that table advocate that we repeal the damages remedy for race discrimination cases in order to enhance their protection?

Ms. **Hemminger**. No, I don't believe anyone at this——

Chairman **Ford**. Why not?

Ms. **Hemminger**. 1981 does not——

Chairman **Ford**. Because you're afraid to take on race, but you're not afraid to take on women? Why not? If you really believe that we would be hurting women by giving them the same remedy as we give people who assert race as a cause of their damage, then why aren't you concerned about what we are doing adversely to the people who are victims of race discrimination?

Ms. **Hemminger**. Section 1981 does not have the comprehensive remedial scheme that's found in Title VII with the intent to eliminate and resolve discrimination claims as quickly as possible.

One of my sincere concerns about adding the damage remedy to Title VII is the fact that comprehensive schemes to regulate the workplace have traditionally been handled through administrative agencies——

Chairman **Ford**. All right. Let's just stop right there before you get me confused again. Then, what you are telling me now, is, the objection is not to the availability of compensatory damages, but where it appears in the law.

Suppose we make it a free-standing provision like 1981, and don't attach it to Title VII, does the awarding of damages, then made legal by that provision of law, meet your test?

Ms. **Hemminger**. I think that would be most unfortunate, because I certainly believe——

Chairman **Ford**. Then, really what you are objecting to is the awarding of damages, not where it is in the statute?

Ms. **Hemminger**. I think I am addressing both. Both that it would involve the tortification of employment discrimination law, and my experience in California that the availability of the damage remedies has damaged the conciliation process as individuals have been more interested——

Chairman **Ford**. The availability of damage for what kind of separation cases? You mention a figure of $40 million in one case.

Ms. **Hemminger**. Forty-three million, I believe, your Honor.

Chairman **Ford**. What kind of an employee could command from a jury in any court system in this country $43 million damages for separation from their job?

Ms. **Hemminger**. That case was a whistle-blower case involving three plaintiffs, not one individual. And I should note that that award has been vacated based on a finding that one of the jurors in fact had been convicted of a felony and hadn't disclosed——

Chairman **Ford**. Well, the point is that nobody has received $43 million——

Ms. **Hemminger**. No.

Mr.**Ford**. [continuing] for losing their job?

Ms. **Hemminger**. No. That's correct.

Chairman **Ford**. For any reason, in California?

Ms. **Hemminger**. Not to my knowledge.

Chairman **Ford**. Well, you know, it gets a little confusing, because I think maybe I should have retired and gone to California a long time ago, when I hear about judgments like that. Because I can remember, in the town in which Ms. Burns is practicing, having a jury with tears in its eyes, come to me when they awarded me $6,000 for the death of a woman, because she was only a woman. And I asked him, what about the instructions you had from the judge about what her value—even though she was only a waitress, and daddy was a carpenter—that she had to her family if she had been allowed to live beyond her twenties.

And this fine, religious fundamentalist, who ended up as the foreman of the jury, with a tear in his eyes, handed me a religious tract and said, "After all, women have no value." Now, that was Detroit, Michigan, where now Ms. Burns is telling me I should be back there practicing, because the judgments have gone crazy. But it took us years, Mrs. Burns, to get the bums off the jury, and get voters on the jury. Now we use automobile registration; do we not? And we've made it a little more difficult for the better citizens to get off of jury duty.

All those things were brought about by the plaintiffs' bar, not by the defense bar. Because the defense bar used to be very happy to have the hangers-on that hung around the old county building, or the old Federal building, picked for jury duty time after time, because for the minimal fee they got a jurors, they like to get along with the people they saw most often in court.

Now, those days are behind us, and I am hearing here from fellow lawyers testimony that I would have found persuasive, and might even have repeated 35 years ago when I was practicing in Detroit, when there were no women in your law firm. But since then I have a daughter-in-law, who is a lawyer; a wife who is a lawyer; and a son who graduated with a class with one-third women from the same school that I graduated, with only two men in the graduating class.

Things have been changing, changing very rapidly. And what I think I have heard here, is an explanation of justification for the way things were. Not for the way things are. And I have to tell you that I'm not persuaded by what you say, that real concern for deleterious impact on women, who are victims of sex discrimination, is at the base of your testimony against money damages.

Plain and simple, I am left with the conclusion that, except in the case of Mrs. Hemminger, who says she speaks only for herself, and therefore doesn't expect to save money, by not paying anybody damages, certainly the clients in the National Association of Manufacturers can be persuaded that if you convince us that money damages aren't there, that they will save money.

That's the same group that I meet with every year in my state and tells me what we have to do is cap damages for product liability. Are they still advocating a Federal statute to cap damages for product liability?

Mr. FASMAN. I don't know, Mr. Chairman.

Chairman FORD. Your organization has been at that change in all of the state tort laws for longer than anybody in this town in my 26 years here. So, if we set a precedent here by adopting some kind of a cap, that would really place me in a box to tell the Michigan Manufacturers Association the same thing I have been telling them for years, I don't believe we ought to be capping damages and taking a chance on constitutional violation of the right to a trial by jury.

We are not legislating in a vacuum here. We are legislating in a real world, with real people, with real economic interest involved. And I would finish by observing that I am very pleased that there is no indication from any of you that economic well-being, or enlightened self interest from an economic point of view, has anything at all to do with the theories you've advanced to us today about how to write civil rights legislation.

And I'm not going to suggest that that's not accurate or frank on the part of any one of you. I just have to suggest that you left at least one of us unconvinced.

Mr. Henry.

Mr. **Henry**. Quickly, Mr. Chairman. I will concede very clearly my opinion. You made the point on the analogy in terms of damages on race discrimination versus sex discrimination. I don't want to impugn the integrity of our witnesses.

The other issue. What I wanted to explore—we have a vote, we won't have a chance for a dialogue. But one of the issues is, what opens the potential for liability on the front side? And I think we got some very good testimony from Mr. Fasman in terms of the shifting from manifest relationship to significant relationship for successful job performance on disparate impact. And, subsequently, I should point out, some ambiguities in drafting which would potentially open up disparate impact issues for damage awards, if I understand his testimony correctly.

Secondly, I think there are some constitutional issues, potentially, even in terms of contributing factors in the so-called *Price Waterhouse* remedy in the bill. So, I think the concerns are not just going to be in terms of, are we analogous in the way we are handling sex discrimination issues, vis-a-vis racial discrimination issues, and being advised of the terrible costs that potentially are out there, but what may trigger a cause for action and established grounds for remedy in the first place. I wish we had had opportunity to do that. I have to excuse myself to vote.

But, I do want to say, I think that on balance, the testimony we have had in this committee today with both panels has been some of the best testimony I have ever heard as a Member of Congress in terms of taking it in its totality. And I want to thank our witnesses.

Thank you.

Mr. **Hayes**. Thank you. I apologize for the Chairman of our committee having to leave rather suddenly, but the speaker, who we must respond to, has called all the committee chairmen to a meeting to discuss the calendar, so he had to go.

Mr. Fawell.

Mr. **Fawell**. There is a vote on, Mr. Chairman, if we could adjourn for that.

Mr. **Hayes**. Do you think it is too inconvenient for the witnesses to come back if we can go vote in five minutes? I don't want to say five; it takes a little longer. I know you have been here a long time; you may have schedules or transportation you have to meet. Is that kind of a problem?

Professor Ross. I have to be able to leave here by about 4:15, 4:20, I think, if possible.

Mr. **Hayes**. We will be through before then. I will see to it, if I am Chairman.

Can we recess, then, for at least five or six minutes?

Professor Ross. We would be delighted to remain.

Mr. **Hayes**. All right.

[Recess.]

Mr. **Hayes**. In order to make the most of the time that we have that is fleeting away from us, I would like to resume the hearing, because, as I said before we left, some may be under pressure of time.

I would like to, at this time, call upon my colleague, Congressman Fawell.

Mr. **Fawell**. Thank you, Mr. Chairman. As you can see, there ain't too many of us here, but I do appreciate your sticking around because I feel a certain amount of frustration. I worked, as Congressman Washington said this morning, he and I attempted to work together last year to try to forge a compromise bill, and I think both of us felt that if we could be left alone we could have done it. But you just couldn't get there from here, supposedly.

The testimony has been very good, by each and every one of you, though you are diametrically opposite in your conclusions. This is the frustrating part of it. I guess I have comments more than questions, but I do have one question.

I don't know how many of you were here during the day, but I look at what is a place of employment labor law statute. It is not a general tort. It is nothing like Section 1981, which, by the way, under the law right now, harassment cases are not even authorized. That is what the *Patterson* decision was all about.

So the analogy, it seems to me, to compare Section 1981 with what we are doing in labor law statutes, you have four walls where someone works. When one walks out of those doors, the very same things for which a cause of action would accrue to him or her within the four walls will not accrue outside those four walls. You can have the lady who testified to the egregious type of discrimination sexually that she endured. Indeed, you could walk out on the streets and this can occur, and there is no cause of action.

What we are trying to do, and what I try to emphasize consistently, as I meet with the Republican task force and with good friends of mine on the other side of the aisle, as we try to craft something that would dovetail into a place of employment labor law statute, knowing that what we do here, you have the NLRB waiting, you have the Fair Labor Standards Act, you can go on and on and on.

I, truthfully, don't know of any really analogous statute where compensatory and punitive damages are authorized. Congress has not, from my viewpoint, taken that kind of a step as yet.

As I hear the testimony, I might also say, Mr. Golden, you were very impressive. You have to be a plaintiffs' attorney and a very good one. You were so good that you dissuaded me to the opposite, because when you said, for instance, that there are no such things as uncapped damages, that would be beautiful oratory for a jury, but there are.

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But you were making a very good point by saying that, obviously, you have to prove the case and that caps will then be determined on the basis of the proofs, but, of course, with the eloquence of one who can articulate as well as you can and take what might be deemed by many people to be relatively inconsequential mental stress into something that has ruined the life, and you could pull out $2 million, where you might have been able to settle it for $40,000, or something of that sort.

This is what I think we are concerned about. I recognize that we have defense attorneys sitting there, and we have plaintiffs' attorneys sitting there. It is not necessarily unnatural to generally expect that from your different viewpoints, with full sincerity of view, you come to these diametrically opposite viewpoints.

I am still looking at what is now and has for 25 years, even in the words of Congressman Don Edwards, who is a very fine gentleman in the Judiciary Committee, saying that for 25 years the conciliatory, get back to work, get these parties together place of employment statute has worked well, and all we want to do is to repeal five Supreme Court cases, which is a deeply arcane set of circumstances in itself.

But, no, here we are, if you will excuse the expression, monkeying around with a place of employment statute that we have to carefully craft. I sometimes think that maybe we make a mistake in having expert witnesses here and should bring in taxpayers and say, "What do you think if we do something like this? Do you think there will be an explosion of all kinds of shooting for the lottery, as in California, for instance, with wrongful discharge?"

I have been in Congress—this is my seventh year—but I was in the general practice for a number of years, and we got into the retaliatory discharge cases. They are dynamite if you can just play it right. There is no question about that. And the explosion of those cases in Michigan, I gather, and California, I think are very analogous. They are very persuasive to me.

As I mentioned to several of the witnesses today, we all would like to be able to have something that would have the effect of deterring that kind of conduct by an employer, and I agree some kind of good, heavy damages are helpful. But we could have an administrative remedy with civil damages, which will not necessarily give that kind of recovery to the plaintiff, but let her recover attorney fees, so she can become a party to the administrative proceedings and such things as that.

There are, hopefully, other ways in which we can accomplish something here and have a harassment cause of action without, I think, making a very tragic error by introducing into the area of place of employment labor statutes this kind of a concept that we can shoot for the lottery. I do see that as an attorney.

I remember, the ABA, for instance, when this bill was first introduced last year. Without even going to the employment sections, they endorsed it. In two or three days after the bill was introduced, I mean, the plaintiffs' attorneys leaped at it like a fish or a worm. And that wasn't too impressive. I wasn't very proud. I am a member of the ABA also, but I wasn't very proud of what they did in San Francisco in endorsing that without hearings whatsoever.

That is not good advertisement for plaintiffs' lawyers. But I would hope that all of you, if you don't have something, some kind of a compromise craft of a harassment section that you could perhaps submit to this committee later, if you don't have any comments on that.

It is something that doesn't tortify and eventually add to the feeling that an employer has, "I'd better find safe harbor" between the possibility of quotas at one end of the bill, in which people of good intentions see different conclusions, and then with the possibility of having your double counts, and one for intentional and one for unintentional discrimination, and shoot for the works with multi-million-dollar lawsuits, which will intimidate and can intimidate even nasty, exploitive employers and cause them to go into safe harbor.

It must be that we can craft something very carefully that will give enough incentive and desire by the plaintiff, who has to have some intestinal fortitude to stand up in these harassment cases and file a suit, there ought to be some kind of, certainly, attorney fees covered, and there ought to be some type of a monetary award that will give the lesson, but it has to be, it seems to me controlled.

That is more a speech, obviously, than a question, but any comments that any one of you has in reference to my desperate search, I would appreciate receiving your comments.

Professor Ross. I would like to comment on the idea that Section 1981 is very different in kind from Title VII. I think that is just not true. It is used exactly as Title VII is used in the employment discrimination context. My students had a case against a hospital on behalf of a black woman who was not hired as a security guard, and one count in the complaint was a Title VII claim alleging both race and sex discrimination, separately and combined, and another count was a Section 1981 race discrimination claim.

So it is used the same way. The reality is that the majority of Title VII plaintiffs now have Section 1981 available. It is just a question of extending that to one more category of Title VII plaintiffs.

Mr. **Fawell.** If I could just interrupt you, it seems to me that—of course, that is a 100-year-old statute which didn't even apply to private actions a short time ago. And I don't think there has been any kind of a definitive study in reference to the use of it insofar as harassment cases are concerned.

There may be, if there is a study, it will certainly be instructive, but we certainly cannot sit here and ignore the fact that, for instance, in California, I imagine nobody goes to 1981; they might as well pick the available remedy of the state where you are getting these big awards and utilize those kinds of remedies.

But, certainly, one cannot ignore what is happening in Michigan with wrongful discharge cases and discrimination cases under state laws and the tremendous recoveries which are taking place. As it is right now, as I have indicated, harassment cases are not authorized because of the *Patterson* decision, although this bill will change that, because I think there is no argument that that ought to be changed.

Mr. **Hayes.** Professor Parker, I saw you pull the mike up. Do you have a comment?

Professor **Parker**. Thank you. I think it is going to be very difficult to talk compromise if, at the same time, you are saying that Title VII is only a labor statute. There is a long, long history that associates Title VII with civil rights statutes. So for you to see it only as a labor statute and to ignore the fact that it is also a civil rights statute is disingenuous.

Mr. **Fawell**. I really don't ignore that it is a civil rights statute too.

Professor **Parker**. That is right. And, as a civil rights statute, it is unique only in the sense that it does not provide for compensatory and punitive damages. 1981 does; 1982; 1983; the Fair Housing Act of 1968, not 100 years ago; the Age Discrimination Act; and also, as a labor statute, it is unique in that it doesn't provide for money damages. You know, there are several labor statutes that have liquidated damages provisions, and this Title VII is the only one without it.

So to say that Title VII is a labor statute and you are going to be adding something to labor laws is not accurate.

Mr. **Fawell**. I would be interested in looking—first of all, 1981 is not a bit analogous. That is a law that pertains to the right not to face discrimination when one enters into contracts. In general, only one particular part of that deal with employment contracts.

Professor **Parker**. I disagree with the Supreme Court on that. I mean, I teach contracts; I know contracts; you know contracts. It is very, very awkward to say that a contract only governs time one and does not govern the terms and conditions of performance. Nobody——

Mr. **Fawell**. I would agree with that.

Professor **Parker**. That is a brand new idea that the Supreme Court came up with.

Mr. **Fawell**. Well, I wouldn't argue that point. I am simply saying that it is not a labor statute.

Mr. **Hayes**. If I may, colleague, you have gone beyond the time allotted for you.

Mr. **Fawell**. May I just ask if there are any more comments in reference—because several did want to comment. If the Chairman would allow the full response.

Mr. **Hayes**. Yes, you may, but make it brief, if you may.

Ms. **Burns**. It will be very brief.

Mr. **Hayes**. Yes.

Ms. **Burns**. I simply want to respond to your request for suggestions for compromise approaches. I think that that is an excellent motivation here. I don't think that there is anything wrong with looking at the NLRA model. I think that in states like Michigan it would be very easy to find information about the steps that both plaintiffs and defense attorneys and state legislators are taking to try to resolve the issues of mushrooming wrongful discharge litigation.

There are proposals for alternatives dispute resolution mechanisms that could be looked at. I would be more than happy, if you are serious about wanting suggestions and supplemental materials in writing, to do that very thing. If you have a time frame, I will meet it.

Mr. **Fawell**. Speaking on behalf of our task force, we would very much appreciate this. We are searching right now to try to come up with what we think is fair.

If there are no more comments, I thank the Chairman.

Mr. **Hayes**. I am going to recognize Mr. Fasman. Go ahead.

Mr. **Fasman**. Mr. Chairman, thank you. I will be brief in the way that real people mean brief instead of the way lawyers mean brief, and that is just to say that there have been——

Mr. **Hayes**. That would be unusual. Go ahead.

Mr. **Fasman**. Well, I'll try. There have been a number of alternatives introduced in Congress, both last term and we understand introduced this term, which the organizations I am representing have supported at various times. I think those are at least worth some serious consideration as alternatives. Certainly, they are receiving our serious consideration.

Mr. **Fawell**. Once again, I think, Mr. Golden, do you have a comment also?

Mr. **Golden**. Yes. I just wanted to indicate that it just seems to me that there is a distinction between what has been traditionally known as labor law, in terms of NLRA and across the bargaining table, and administrative remedies as opposed to going to court, and no juries.

In the last 10 years, there has been a dramatic change in this country in terms of what labor law really is and how it is being applied. With the California experience and the experience that we have had in our home state, what we are seeing is this due process application to the workplace because of the realization that we are not a mobile society anymore.

I mean, people used to come from down south to Detroit, go to Ford, get hired; come from Canada, go to Ford, get hired. And if they didn't like it there, they would move on to somewhere else. That doesn't happen anymore. There are a quarter of a million people on the layoff list now. People don't go from one job to the other.

The reality is that stability and job security has taken on a new meaning in this country, so that the protection of that employment relationship that we are seeing now is basically social reform. The realization—it happened to start at the state level—the realization that you must protect somebody, there is a right involved when someone, because of a promise, because of something in writing, changes his life: has children, doesn't have children, as a result of being able to have a job, moves to a locale, goes to church, sends their kids to school, all as a result of this work relationship.

When you talk about labor law as it was as opposed to civil rights being something completely separate, I think what we are seeing in this country is a merger of the two into what is now the new labor law. So I am not so sure that when you talk about labor laws as opposed to civil rights laws it is not coming to the point where they are almost together, and you can't talk about one without the other.

The job security may in fact become a civil right, not in the context that we have known it before, but in the future. So those protections must be there for all people, equally. The argument is, it is not there equally for women now, and that is the change that we are asking to be made.

Mr. **Fawell**. Thank you.

Mr. Chairman, thank you for your patience.

Mr. **Hayes**. Before winding up this hearing, I have one question I would like to direct to Professor Parker, and maybe some of the rest of you might want to comment on it; I don't know.

As one who is not only conversant in constitutional law—I heard you indicate you are teaching constitutional law—I would like to know, in your view, the damages proposal offered by the administration last year, if they were in violation of the Seventh Amendment because they didn't provide or don't provide for jury trials.

Professor **Parker**. Well, I think it is. I think that the effort to call the damage remedy equitable is an effort to circumvent the Seventh Amendment, but I don't think it works. One reason is that this monetary amount is not an equitable remedy.

I am really not sure that if the Supreme Court looked at the back pay award it would consider that an equitable remedy—it might say that the Seventh Amendment is involved anyhow. But it seems to me that to prescribe a remedy that has obvious Seventh Amendment problems in a statute that is as important as this is irresponsible. What I would rather see is a proposal that had the jury involved, so that it was clear that there is no constitutional problem.

I think it is clearly a legal remedy. The model is legal. It functions as a legal remedy. As I say in my written testimony written to the committee, this is not like an injunction. One of the very, very great differences between an equitable remedy and a legal remedy is history. And what history tells us is that most restitution remedies are legal. They started in the common law courts.

If you found the historical analogy of back pay, it would be legal in a common law court. If you find any money award, it is going to be legal. When you get equitable remedies that attach money, you are talking about remedies like constructive trust and equitable lien; you are not talking about a remedy that looks anything like this remedy that is provided in the statute.

So I think that if the Supreme Court took a look at this head on, the Supreme Court would conclude that it does violate Seventh Amendment, given what the Supreme Court has said recently about the Seventh Amendment.

Mr. **Hayes**. Does anyone else on the panel have any comment that might be different from what he suggested or supported?

[No response.]

Mr. **Hayes**. Apparently not. I just want to thank the panelists for very meaningful and helpful testimony. Although we have some differences of opinion, you expressed them well, I think. I know as we proceed to try to place this piece of legislation, from the point of passage, I know that what you have said here is not going to be ignored. That is not the purpose of this kind of hearing.

I want to thank you. Those of you who are riding the planes, I hope you won't miss them. Thank you very much.

[Whereupon, at 4:15 p.m., the committee adjourned, subject to the call of the chair.]

HEARING ON H.R. 1, THE CIVIL RIGHTS ACT OF 1991

TUESDAY, MARCH 5, 1991

House of Representatives,
Committee on Education and Labor,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in Room 2175, Rayburn House Office Building, Hon. William D. Ford [Chairman] presiding.

Members present: Representatives Kildee, Hayes, Sawyer, Payne, Lowey, Unsoeld, Washington, Mink, Jefferson, Roemer, de Lugo, Fuster, Goodling, Petri, Roukema, Gunderson, Armey, Fawell, Henry, Ballenger, Molinari, and Klug.

Staff present: Reginald C. Govan, counsel; Gregory Watchman, associate counsel; Randel Johnson, minority labor counsel; Dorothy Strunk, labor coordinator; Kathy Gillespie, professional staff member; and Tracy Hatch, professional staff member.

Chairman Ford. Welcome to our second full committee hearing on H.R. 1, the Civil Rights Act of 1991. Last week the committee's principal focus was on issues relating to the remedies available for correcting workplace wrongs.

Among those remedies are compensatory and punitive damages, and it is noteworthy that yesterday the Supreme Court by a vote of seven-to-one reaffirmed the principle that punitive damages are an important part of the American legal tradition.

This week we will look at issues relating to the burden of proving unfair employment practices. In examining these issues we need to bear in mind our goal: Striking a proper balance between protecting employers from spurious claims of unfair treatment and the legitimate rights of employees to be free from invidious discrimination in employment.

H.R. 1 overturns a number of Supreme Court decisions which protect employers who discriminate. In considering the appropriate legislative response to these decisions, our goal should be to protect employees. As I said last week, we are here together to fashion legislation to prevent bad employers from doing bad things to good people who work hard.

Equal opportunity laws benefit all workers regardless of gender, race or age. However, they are useless if they are not enforceable. Regrettably, in a letter to Speaker Foley the administration has switched its position and no longer seeks to overturn the decision in *Wards Cove.*

We sent American troops halfway around the world to fight for the principles which have made us strong: freedom and equality. Our actions in this committee must insure that these principles are not just an American export, but are available to the American troops who come back as well as American workers already here.

Representative Jefferson has asked that his statement be inserted in the record. Without objection, it is so ordered.

[The prepared statement of Hon. William J. Jefferson follows:]

PREPARED STATEMENT OF HON. WILLIAM J. JEFFERSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Good morning. Mr. Chairman, my distinguished colleagues on the Education and Labor Committee, I appreciate the opportunity to be a part of this important and historic discussion on this landmark legislation.

During the course of today's hearing on H.R. 1, the Civil Rights Act of 1991, I sincerely hope that two popular myths shrouding this legislation will be stripped away. I hope that we will all come to understand that H.R. 1 is not a "quotas" bill, and secondly that it will not lead to a so called "lawyer's bonanza."

The fundamental purpose of H.R. 1 is to rectify a colossal inequity in current Federal civil rights law, and make good on the Constitution's promise of fair treatment to all its citizens—women and men. H.R. 1 seeks to remove the barriers created by several recent Supreme Court decisions that prevent victims of intentional employment discrimination from obtaining effective remedies. It restores the common sense approach to proof in civil rights cases that was observed by Congress and our Federal court system for more than twenty years.

In the last Congress, there were attempts to dismiss this civil rights legislation by branding it a "quotas" bill. H.R. 1 contains explicit language that employers are not required or encouraged to adopt hiring or promotion quotas. It is hard to imagine more precise language outlawing quotas. And the *Griggs* standard invoked by H.R. 1 establishes that a discrimination claim based on simple numerical underrepresentation is not sufficient to support a charge of employment discrimination under Title VII. It is clear that H.R. 1 would not unfairly benefit minorities at the expense of nonminorities. The truth is, the primary beneficiaries of the fruits of this bill will be women, not racial minorities. H.R. 1 would bring women under the same protective umbrella that shelters other American citizens from discrimination in the workplace. The present law does not provide women the same remedies, punitive and compensatory damages, that are already available to racial minorities under Section 1981.

Prior to my election to Congress, I practiced law for eighteen years, many of them as a trial lawyer. Contrary to opinions I have heard about the potential of H.R. 1 to spawn floods of frivolous cases, the real world experience is that experienced lawyers don't file meritless claims because there is no profit in them. Particularly, this is true for Title VII cases, where a lawyer must prevail in his contentions to earn a fee. This feature actually discourages frivolous suits. Further, this has not been the case under Section 1981 remedies in the past, and there is no reason to believe that the extension of 1981 type remedies to women would lead to such a result. There is simply no evidence to suggest it.

In addition to restoring the integrity, breadth and efficacy to Federal civil rights law, extending further legal remedies to women and minorities will have a positive effect on the Nation's economy. Discrimination against women and minorities in the marketplace hurts our economic infrastructure. By the year 2000 the overwhelming majority, 80 percent, of new employees entering the labor force will be women and minorities. These individuals must not be confined to low paying, low skill jobs. They must not be held back by discriminatory practices. Doing so will only result in lost productivity today and risk our Nation's competitive edge in the future.

I applaud your desires, Mr. Chairman, to move this legislation expeditiously. And I hope, once passed, the President will be equally expeditious in signing it into law.

Chairman FORD. Representative Reed was not able to be present but has asked that his statement be included in the record. Without objection, it is so ordered.

Prepared statement of Hon. John F. Reed, a Representative in Congress from the State of Rhode Island

Mr. Chairman, today our committee continues the process of ensuring that the civil rights of all Americans are protected. There is a great need to reverse the decisions which have created a situation where the victims of discrimination must supply the burden of proof. The Civil Rights Act of 1991 will do so.

The *Wards Cove* decision creates a milieu in which employers no longer have to demonstrate that their hiring and promotion practices serve legitimate goals. Employers must only offer some evidence of that such practices are not based on gender, religion, ethnicity, or race. At the same time, *Wards Cove* shifts the burden of proof. The *Griggs* decision holds that businesses which use practices that create discriminatory effects can utilize such practices if they are justifiable as a "business necessity." *Griggs* did not result in quotas because mere underrepresentation of a group is not sufficient to alter such practices. The Civil Rights Act of 1991 codifies *Griggs*, and stipulates under section four, (B)(4) that "the mere existence of a statistical imbalance in an employer's work force on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation." In other words, the existence of a numerical inequality will not lead to quotas; *Griggs* simply ensures that hiring and promotion is based on job qualifications, and that employers must prove that discriminatory practices are necessary.

I would like to thank today's witnesses for their testimony and preparation. Thank you.

Chairman **Ford**. Our first witness this morning will be Brenda Berkman. Unless someone has a comment before she starts, we'll go directly into the testimony.

You may proceed, Ms. Berkman, to summarize, highlight or comment on your testimony, which will be inserted in full in the record at this point, in any way you are most comfortable.

STATEMENT OF BRENDA BERKMAN, PRESIDENT, UNITED WOMEN FIREFIGHTERS, BROOKLYN, NEW YORK

Ms. **Berkman**. Good morning. My name is Brenda Berkman. I would like to thank Chairman Ford and the committee for inviting me to testify this morning on the Civil Rights Act of 1991.

For the past nine years I have been a firefighter in New York City. I am the founder and president of the United Women Firefighters, which is based in New York City, and I also serve as a trustee of Women in the Fire Service, the national organization for women firefighters.

I also have with me here today Dee Armstrong, who is a trustee of Women in the Fire Service and serves as a sergeant in Fairfax County, Virginia; and Troy Robinson who is a firefighter with Prince William County.

In recent weeks we have heard much about the progress and contribution of women in the military. As a firefighter, I cannot help but draw parallels between their experience and that of women seeking the opportunity to serve their communities in the fire service.

Some of the stereotypes I have encountered in my life have been overcome. Girls are now allowed to play Little League, and our colleges and universities now fund women's athletic teams, but we have not yet overcome many employment-related stereotypes in the military, the fire service and many other occupations. Until we do, strong civil rights protections are of vital importance. That is why I am here today on behalf of all American women in uniform and those in other nontraditional employment as well.

My story begins in 1977, when I was among the first group of women ever allowed to take the test to become a New York City firefighter. I recognized that the job involved significant risks, including putting myself in life-threatening situations on a daily basis, and subjecting myself to toxic exposures which shorten the average firefighter's life by ten years.

Nevertheless, many of my family members have had careers in the civil service and I believed that becoming a firefighter would be a most challenging and rewarding form of serving the public.

I took the written test in December of 1977, with 409 other women and over 24,000 men. Almost all of us passed the written test. Although 389 women passed the written test, only 88 took the physical test because it was rumored that no woman could pass it.

We were required to complete seven tests: a dummy carry, a hand grip, a broad jump, a flexed-arm hang, an agility test, a ledge walk, and a one-mile run. The rumor turned out to be accurate: although 7,847 men passed the physical exam, not a single woman passed it.

I decided to challenge the test because I did not believe that it tested fairly for the skills needed to be an effective firefighter. The trial court found that the test had a disparate impact on women. The judge also held that the City had failed to prove business necessity, because the abilities tested by the physical exam were not predictive of job performance.

Indeed, the judge found that a large number of male firefighters already on the force would have failed various portions of the test. The court stated that the height-related eight-foot wall climb was included in the exam without adequate justification and "became not just a stumbling block, but a literal barrier for all women taking the exam."

The judge also found that carrying a dummy with no arms or legs was more difficult than carrying a real person. I was unable to carry the 120-lb. dummy, as were 76 of the 80 women who tried, but at trial I carried my 180-lb. counsel across the courtroom to show the judge I could carry a live person.

Also, I might remark that once we were put into the Fire Academy, we learned very different ways of carrying victims out of buildings than the ways we were being tested on in the entry-level exam.

The judge invalidated the physical tests as a violation of Title VII. The firefighter's all-male union appealed the decision, but the Second Circuit upheld the trial court's ruling.

After completing and passing an interim physical exam that was more job related than the first, I was ultimately hired in 1982, with 41 other women. I was finally on my way to becoming a firefighter.

The history of women in the fire service often seems like one step forward, two steps back. Once hired, we were denied the ordinary amenities of cooperative firehouse living and subjected to daily sexual harassment and hazing. This included crude sexual comments, obscene graffiti and physical molestation.

After one year I was terminated, along with Zeda Gonzales, another female firefighter. We challenged the terminations in court, and the judge held that we had been discharged in retaliation for playing a prominent role in the law suit. Zeda and myself were, at that time, the most prominent women in the New York City litigation.

The judge found that the city had failed lamentably to prepare its all-male work force for the integration of women, and had demonstrated "extraordinary laxness."

The judge found that we had been sexually harassed; that we had been intimidated into withdrawing complaints about how we were being treated; and that the opportunity to demonstrate our abilities had been "deliberately withheld" from us.

The judge concluded that he "entertained no serious doubts" that I had the ability necessary to become a competent firefighter.

Under court order, we were reinstated in 1983, and I am happy to say that I have been serving as a firefighter since that time.

We should note that my experience in New York was by no means unique. Across the country many municipalities changed the requirements for the fire service in the 1970s in an effort to keep women out. The all-male firefighter unions generally supported this effort, and we still have a long way to go. Today, less than one percent of our nation's paid and volunteer firefighters are women.

I am here today to express my strong support for the Civil Rights Act of 1991. I do not believe I would have won my case under the principles set forth in *Wards Cove*, particularly given our increasingly conservative Federal judiciary.

For starters, the city would not have had to link the firefighter's physical exam to job performance, but could simply have offered any generalized business objective. More importantly, I do not believe I would have been able to meet the burden of proving the absence of any legitimate business reason for the test.

If *Wards Cove* had been decided in 1979, rather than 1989, New York City would probably still not have a single woman firefighter.

I would also like to say to the members of the committee who are concerned that employers will not be able to defend employment practices under the standards set forth in this bill, that that is not the case. For example, when the district court first struck down the firefighter's physical exam in 1982, it ordered the city to develop a new test that would be more predictive of job performance and have less of a disparate impact on women.

When the second test was administered, however, the pass rate for men was 95 percent, while the pass rate for women was 47 percent. Moreover, the test emphasized speed and explosive strength over stamina and endurance, which the judge in my case recognized to be more important in fighting fires.

What effect did this test have on the hiring of women? Since 1982, when I and the 39 other women were first hired, the City of New York has hired 7,000 men as firefighters and not a single woman. There are currently only 35 women out of a total force of 11,000 New York City firefighters. Nevertheless, our challenge to the second physical test was rejected by the Second Circuit. The city was able to establish the business necessity of the second exam. I disagree with the result, but I don't think anyone can argue that employers will not be able to establish the business necessity defense if the pre-*Wards Cove* rules are restored.

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Let me conclude. In 1975, I came to New York City from Minnesota, and I became interested in becoming a firefighter, but at that time New York City would not even let women take the firefighter exam. So, instead, I spent three years getting a law degree from New York University Law School. After practicing immigration and civil service law for four years, I finally was given the opportunity to become a firefighter.

It was only after a tremendous struggle, both in and out of the courts, however, that I was finally able to realize my dream. Ladies and gentlemen, many women seek to break down the barriers into nontraditional employment primarily for economic reasons. For me that was not the case. I gave up a salary of $40,000 for a starting salary as a firefighter of less than $18,000. I gave up the practice of law and the economic opportunities associated with it to pursue a different dream, that of putting my life on the line every day to protect the lives and property of New York's citizens.

In the last nine years I have been assigned to some of the city's business fire stations in both Harlem and Brooklyn. I received a unit citation and I have served as an instructor at our fire academy. I have also had the honor of serving on our Fire Commissioner's Special Advisory Board and on a number of committees of the National Fire Protection Association.

Without Title VII, without the *Griggs* decision, and without the disparate impact theory, I would never have been able to achieve that dream.

I thank you very much.

[The prepared statement of Brenda Berkman follows:]

Brenda Berkman
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Sergeant-At-Arms

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STATEMENT OF BRENDA BERKMAN

before the Committee on Education and Labor
United States House of Representatives
March 5, 1991

Good morning. My name is Brenda Berkman. I would like to thank Chairman Ford and the Committee for inviting me to testify this morning on the Civil Rights Act of 1991.

For the past nine years, I have been a firefighter in New York City. I am the founder and President of United Women Firefighters, which is based in New York. I also serve as a Trustee of Women in Fire Service, a national organization.

In recent weeks, we have heard much about the progress and contribution of women in the military. As a firefighter, I cannot help but draw parallels between their experience and that of women seeking the opportunity to serve their communities in the fire service. Some of the stereotypes I have encountered in my life have been overcome-- girls are now allowed to play little league, and our colleges and universities now fund women's athletic teams. But we have not yet overcome many employment-related stereotypes in the military, the fire service, and many other occupations. Until we do, strong civil rights protections are of vital importance. That is why I am here today on behalf of all American women in uniform and those in other non-traditional employment as well.

My story begins in 1977, when I was among the first group of women ever to be allowed to take the tests for becoming a New York City firefighter. I recognized that the job involved significant risks, including putting myself in life-threatening situations on a daily basis, and subjecting myself to toxic exposures which shorten the average firefighter's life by ten years. Nevertheless, many of my family members have had careers in civil service, and I believed that being a firefighter would be a most challenging and rewarding form of serving the public.

I took the written test in December, 1977 with 409 other women and over 24,000 men. Almost all of us passed. Although 389 women passed the written test, only 88 took the physical test because it was rumored that no woman could pass it. We were required to perform seven tests: a dummy carry, a hand grip, a broad jump, a flexed arm hang, an agility test, a ledge walk, and a one-mile run. The rumor turned out to be accurate: although 7,847 men passed the physical exam, not a single woman passed it. I decided to challenge the test because I did not believe that it tested fairly for the skills needed to be an effective firefighter.

The trial court found that the test had a disparate impact on women. The judge also held that the City had failed to prove business necessity because the abilities tested by the physical exam were not predictive of job performance. Indeed, the judge found that a large number of male firefighters already on the force would have failed various portions of the test. The court stated that the height-related eight-foot wall climb was included in the exam without adequate justification and "became not just a stumbling block, but a literal barrier for almost all women taking the exam." The judge also found that carrying a dummy with no arms or legs was more difficult than carrying a real person. I was unable to carry the 120 lb. dummy, as were 76 of the 80 women who tried, but at trial I carried my 180 lb. counsel across the courtroom to show the judge I could carry a live person.

The judge invalidated the physical test as a violation of Title VII. The firefighters' all-male union appealed the decision, but the Second Circuit upheld the trial court's ruling. After completing and passing an interim physical exam that was more job-related than the first test, I was ultimately hired in 1982 with 41 other women.

I was finally on my way to becoming a firefighter. But the history of women in the fire department often seems like one step forward, two steps back. Once hired, we were denied the ordinary amenities of cooperative firehouse living, and subjected to daily sexual harassment and hazing. This included crude sexual comments, obscene graffiti, and physical molestation. After one year I was terminated, along with Zaida Gonzalez, another female firefighter.

We challenged the terminations in court, and the judge held that we had been discharged in retaliation for playing a prominent role in the lawsuit. The judge found that the City had "failed lamentably" to prepare its all-male workforce for the integration of women, and had demonstrated "extraordinary laxness." The judge found that we had been sexually harassed, that we had been intimidated into withdrawing complaints about how we were being treated, and that the opportunity to demonstrate our abilities had been "deliberately withheld" from us. The judge concluded that he "entertain[ed] no serious doubts" that I had the ability necessary to be a competent firefighter. Under court order, we were reinstated in 1983.

I should note that my experience in New York was by no means unique. Across the country, many municipalities changed the requirements for fire service in the 1970s in an effort to keep women out. The all-male firefighter unions generally supported this effort. And we still have a long way to go: today less than one percent of our nation's paid and volunteer firefighters are women.

I am here today to express my strong support for the Civil Rights Act of 1991. I do not believe I would have won my case under the principles set forth in *Wards Cove*, particularly given our increasingly *conservative federal* judiciary. For starters, the City would not have had to link the firefighters' physical exam to job performance, but could simply have offered any generalized business objective. More importantly, I do not believe I would have been able to meet the burden of proving the *absence* of *any* legitimate business reason for the test. If *Wards Cove* had been decided in 1979 rather than 1989, New York City would probably still not have a single woman firefighter.

I would also like to say, to the Members of the Committee who are concerned that employers will not be able to defend employment practices under the standards set forth in the bill, that that is not the case. For example, when the district court first struck down the firefighters' physical exam in 1982, it ordered the City to develop a new test that would be more predictive of job performance and have less of a disparate impact on women. When the second test was administered, however, the pass rate for men was 95%, while the pass rate for women was 47%. Moreover, the test emphasized speed and explosive strength over stamina and endurance, which the judge in my case had recognized to be more important to fighting fires. What effect did this test have on the hiring of women? Since 1982, when I and 39 other women were the first hired, the City has hired 7,000 men as firefighters and *not a single woman*. There are currently only 35 women out of a total force of 11,000 New York City firefighters.

Nevertheless, our challenge to the second physical test was rejected by the Second Circuit; the City was able to establish the business necessity of the second exam. I disagree with that result, but I don't think anyone can argue that employers will not be able to establish the business necessity defense if the pre-*Wards Cove* rules are restored.

Let me conclude. In 1975 I came to New York City from Minnesota, and became interested in becoming a firefighter. But at that time, the City would not even let women *take the test*. So instead I spent three years getting a law degree from the New York University Law School. After practicing immigration and civil service law for four years, I finally was given the opportunity to become a firefighter. It was only after a tremendous struggle both in and out of the courts, however, that I was finally able to realize my dream.

Ladies and gentlemen, many women seek to break down the barriers into non-traditional employment primarily for economic reasons. For me that was not the case; I gave up a salary of $40,000 for a starting salary as a firefighter of less than $18,000. I gave up the practice of law and the economic opportunities associated with it to pursue a different dream: that of putting my life on the line every day to protect the lives and property of New York's citizens. In the last nine years, I have been assigned to some of the City's busiest fire stations in both Harlem and Brooklyn, have received a unit citation, and have served as an instructor at the fire academy. I have also had the honor of serving on the Fire Commissioner's Special Advisory Board and on a number of committees of the National Fire Protection Association. Without Title VII, without the Griggs decision, and without the disparate impact theory, I never would have been able to achieve that dream.

Thank you.

Chairman **Ford**. Thank you very much for your testimony. This morning I saw that a politician from the state of California was so anxious to play politics with this legislation that he made a speech to a group of Chinese children, Chinese-American children, in California—as I understand it, young people.

He told them that if this legislation were passed, they, as orientals, might find themselves barred from California colleges and universities.

I suggest that we ought to start awarding a weekly prize to the politician that comes up with the most idiotic attempt to play politics with the issues in this legislation, and that he get the award for the first week.

There is no provision of this bill that has anything to do with school admissions. It concerns employment, and students are not employed. They are presumably and hopefully educated, and they pay for the privilege of going to a school. How he was able to twist the pretzel and get it into the code language he wanted to use, I don't know.

Your testimony indicates that some of the other people who have played politics with this issue are going to have some difficulty because many of us were tremendously impressed when we turned on our television and saw a major of your gender, and as a matter of fact there is a good deal of physical resemblance, quite proudly pointing out that she and her helicopter were one of the very first people across the line when the ground war started with the Iraqis. She modestly then went on to say that she was only one of 25 women flying helicopters into combat with the 101st Airborne Division. Now the 101st Airborne Division could go into the most peaceful place in the world and as soon as they get there all hell breaks loose, so they were not in a soft part of the war.

I wonder if we are going to tell those 25 pilots when they get back, "Well, you've just been working for us as the greatest equal employment opportunity employer in the world, as long as you were fighting for your country, but now that you are back home, we want to protect you against doing things that women haven't in the past done."

I strongly suspect that during the end of World War II, when I was an aviation ordinance man, it would have been a tremendous blow to my ego to find out that women were capable of doing all the brave things that the Navy was training me to do in airplanes.

Just watching what women were doing over there made me feel pretty sheepish about carrying those thoughts for so many years. There is change coming, and I strongly suspect that one of the good things that will come out of a war, if there is such a thing—there are good things that can come out of any war—is that Americans will realize that all of a sudden what they thought was an iron-clad policy in this country about the proper place for women, in the event we were engaged in hostilities, was stood on its head because we needed them and they did their job and they did it in record time.

It is going to be much harder for people to pick out a job like firefighter and say, "That's not a woman's job." Even to me, it was a shock the first time I saw the first female carpenter on a construction job, because I grew up in a time when everybody knew women couldn't be carpenters.

Well, I am now getting old enough to realize that I was lucky to be able to get through my young competitive years before women had a fair chance to compete against me. I feel a little bit of empathy for the young people whose macho is being challenged by people like you wanting to be firefighters.

I think this country will be better off as we look at who we are going to have to be depending on very soon in the future to run our economy, people like you being willing to blaze a trail and take the heat.

One can only imagine how popular you would be in every fire station in New York after you won your lawsuit.

Ms. **Berkman**. Not very.

Chairman **Ford**. It is not hard to imagine that it would be "that woman" or "that—" a different word, one of the "B" words, would be more frequently used than woman. I congratulate you for your testimony and thank you for coming to help this committee.

Ms. **Berkman**. Thank you.

Chairman **Ford**. Mr. Goodling?

Mr. **Goodling**. I am glad you are here today to refocus that debate and congratulate you for your stick-to-it-tiveness and determination. I thought last year's debate was pretty much 1960 all over again, and I thought women and Hispanics didn't get to participate very much in that debate.

Ms. **Berkman**. Thank you.

Chairman **Ford**. Mr. Kildee?

Mr. **Kildee**. I just want to thank the witness for her excellent and cogent testimony. I get good testimony from my wife, my daughter and my mother, and you are in the line. You have really pioneered, and I commend you for what you have done, what you have been willing to do, and commend you for sharing this with the committee. You are absolutely right, and thank you.

Ms. **Berkman**. Thank you.

Chairman **Ford**. Mr. Armey?

[No response.]

Chairman **Ford**. Mr. Hayes?

Mr. **Hayes**. Thank you, Mr. Chairman. I am not going to prolong the hearing with any excessive questioning. I do want to thank the young lady for having persevered and given us the benefit of her experiences past and present.

I know you realize the kind of struggle we have here to make this bill, which you indicated support for, a reality.

Ms. **Berkman**. Yes.

Mr. **Hayes**. From what I hear so far from those who are in positions of power and were against it last year, their position has not changed.

I do have one question, though, is the situation in New York, 35 women out of a force of 10,000 firefighters, representative of a problem that exists around the rest of the country so far as firefighters are concerned?

Ms. **Berkman**. Very much so. Throughout most of the country, as I mentioned before, less than one percent of volunteer and paid firefighters are women.

In most of the country the departments have no women, still have no women on their department or they have at most one woman. It is really the case that some of the initial advances that were made in the early seventies, late seventies, in terms of hiring women and minorities in the fire service have pretty much stopped dead due to the recent Supreme Court decisions.

We don't even know how many women would have liked to have challenged the entry-level standards of their fire departments, and who have been told by attorneys in their communities, "Don't even bother bringing a lawsuit, because under the current Supreme Court standards, you have almost no opportunity of success."

I am sure that my attorneys, had I been bringing my lawsuit in 1989, instead of 1979, would have said that to me: "Don't even bother." As the trustee of the National organization, and a lawyer, I tend to get most of the inquiries from women who are considering bringing lawsuits.

The reason you don't see any losses in the lawsuits, is because nobody is bringing them. When we advise people, when people come to us, the national organization, and say, "What do you think we should do in terms of challenging these tests?" We tell them how difficult, how almost impossible it is to win a lawsuit under the current Supreme Court standards.

What I am telling you here today is that if those standards are allowed to stand, that there will be almost no opportunity for women and minorities in the fire service.

The stereotypes about firefighters, the stereotypes about women are so strong, that it is very, very difficult for us to get voluntary changes or to get changes in the courts under these current standards.

Mr. **Hayes**. I believe you answered my second question. I was going to ask what would you predict for the future for women in the fire service if *Wards Cove* remains in the law.

Ms. **Berkman**. I would say it is going to be extremely difficult for women to move into departments where there have been no previous women.

Mr. **Hayes**. Thank you very much, Mr. Chairman.

Chairman **Ford**. Mr. Fawell?

Mr. **Fawell**. Thank you, Mr. Chairman.

My congratulations, too, to you. You are a persevering, unique person, no doubt. I couldn't help but think, though, as you were expressing yourself, Title VII apparently was an adequate remedy. I stress "was" because your opinion is that it is no longer simply because of the *Wards Cove* case.

I thoroughly disagree with that conclusion, and I don't know how often you have read the case, or if you have carefully analyzed it.

I think that when one looks at—if there are 10,000 firefighters in New York, for instance—statistics would indicate that roughly 50 percent of the available force, I suppose, are women, and it is therefore an automatic conclusion under this legislation that there is a disparate impact caused by the employment practices of the New York Fire Department.

You were able to identify, apparently, egregious employment practices which did cause the type of disparate impact in terms of gender composition of the jobs in concern, as compared with the available work force. I think, however, any fair minded person would say that your comments in reference to the stereotypes, especially when it comes to firefighting, probably of men and women both in this country, are certainly against any plaintiff who would attempt to point out employment practices which caused the disparate impact.

I think we would all agree there are a whole bunch of other things that have caused that also. I would simply suggest that under *Griggs*, where business necessity is defined as a manifest relationship to the employment in question, and under this legislation where significant relationship to successful job performance is the test, I don't think there would be a whole lot of difference in reference to the battle which a lot of young women have to undertake.

I certainly wouldn't counsel to you, as an attorney, which I am, or a Member of Congress, that you should not file a lawsuit under Title VII simply because of the *Wards Cove* decision. Any such implication would be completely and utterly, fallacious.

Let me just close by saying, again, I think without people like you who are spearheading new concepts and new ideas all the laws in the world that we could pass would never avail to bring about change.

I do very much appreciate your testimony, though I must confess I can't agree with those conclusions which are so easily, I think, stated by many people who seem to think this legislation is worthwhile.

Mr. WASHINGTON. Would the gentleman yield?

Mr. FAWELL. Yes, to the gentleman from Texas?

Mr. WASHINGTON. Yes, sir.

I agree with the way you headed out, but I think maybe I got lost somewhere. I am certainly not speaking for the witness, if you expect her to respond to your question. I'm sure you will put the question again, but would you——

Mr. FAWELL. It really was comments, not a question.

Mr. WASHINGTON. Would the gentleman be so kind to point out, at least for this unlearned person, the specific portion of H.R. 1, which is now pending, which you suggested in your comment, would reach a different result in her situation?

Mr. FAWELL. I think she would prevail under this bill or the current law. My objections to this bill, of course, are many and we have discussed——

Mr. WASHINGTON. Excuse me, but the gentleman—and I don't want to cut you off because it is your time.

You started out praising her, as I understand, then you said that because presumably half the people in New York City are women, that this bill would automatically create a presumption that half the fire force should be women. I think there are many people who call themselves legal scholars who would disagree with you.

For the sake of argument, would you specifically point out the section of this bill, since this lady happens also to be a lawyer, would you direct her attention and perhaps mine—I am sure everybody else understands what you are saying. Direct my attention to the specific language that would mandate that half the people in New York City be women firefighters, please.

Mr. **Fawell**. The reference would be to Section 4, where it refers to the fact that one may allege that simply a group of employment practices—one comes in and puts the statistics in to show that there is a disparate impact on the basis of gender when one looks at the available work force as compared to the number of women, for instance, in the particular jobs in question which would be firefighters.

One then, as I read this bill, can simply rest and assume on the basis of statistics alone that indeed disparate impact results from the group of employment practices, without any specification of which employment practices may have actually caused the disparate impact.

Just as this witness has pointed out, there are many, many factors which may have caused it, but the lack of any requirement for specificity of the employment practices which may have proximately caused the disparate impact is what I refer to, and which you and I have on many occasions discussed.

Mr. **Washington**. But would you not agree that in order to follow your assumption to a logical conclusion, you would first have to assume that every person in New York City is qualified to be a firefighter, which, of course is not true.

You have to start from the available work pool that is qualified for the job, my good friend. You don't start with the assumption that every female, much less every male, is qualified to be a firefighter. You start from those who are qualified, and following her testimony, you would start with those who had successfully completed the written exam.

Mr. **Fawell**. If I could respond, the gentleman is correct, of course. There is a qualified work force out there, however, which far exceeds 35.

Mr. **Washington**. Yes.

Mr. **Fawell**. You and I would both agree that statistics would very show an egregious case of disparate impact on the basis of statistics.

Mr. **Washington**. Well, I think I have a different definition of what——

Mr. **Fawell**. I don't know what—if you had a study on how great the disparate impact would be, but it would be quite an egregious disparate impact. My complaint, therefore, is obviously for a plaintiff or a complaining party to sit back and rest saying, "I have now proved my case, and Mr. Employer you are going to have to deaggregate and go over all your employment practices and be able to somehow show us that each one meets the definition of business necessity."

The employer would say, "My gosh, one of the basic reasons, as obviously this young lady has pointed out, the stereotypes and the fact that not many women, probably, want to even be firefighters."

Those are my arguments, and we have discussed them on many occasions.

Mr. **Washington**. Yes, and I appreciate the Chairman allowing——

Chairman **Ford**. The time of the gentleman has expired. We will try to get back to this with you. I wouldn't like us to go beyond this point with the record left the way it was because of my respect for the gentleman, a fellow lawyer from the State of Illinois, which does border close enough to Michigan so occasionally we do business with each other.

He cites Section 4 of this bill as the basis for the assumption that if you counted the population of New York and found that half of them were women that it would automatically cause you to win your lawsuit.

The trouble with that is that like other people who read this type of legislation, the reader either gets tired or goes to sleep before he gets through with it. If you look on page 7, line 10, Subsection 4, the following quote appears "The mere existence of a statistical imbalance in an employer's work force on account of race, color, religion, sex or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."

That is painfully worked-out language that is written in there to make clear that the interpretation that the gentleman has now put on the rest of Section 4 can't be put there because it says, notwithstanding what you might think about this——

Mr. **Fawell**. Would the gentleman yield on this point?

Chairman **Ford**. [continuing] this is the case, and that becomes a matter of law, does it not? Yes.

Mr. **Fawell**. That reminds me of a story of a painting which had a picture of a pipe. The title of it was, "This is not a pipe."

Words like that are absolutely, in my opinion, meaningless as a practical matter. When you look through Section 4 the only realistic course that any employer could take would be to go with quotas.

I did not mean, as the gentleman from Texas did point out, that automatically 50 percent of the women would be qualified, but there are an immense number of women obviously that technically would be qualified. Statistically there would be a big disparate impact.

Chairman **Ford**. We are going to go on to other witnesses. I suggest to the gentleman that he look at the transcript and he will find that he said, not someone else, that the mere finding of a disparate number of people on the New York Fire Department would be prima facie evidence of disparate impact and you would win your lawsuit.

That was your expression of a legal theory, not anybody else's, and how you can say that specific language in a bill, designed to prevent you from reaching that conclusion, is irrelevant is beyond me.

I don't think you are being fair to this record, to the witness or to this committee. I would just ask you to look at the record and see what you said, and see if you don't want to change it.

Mr. **Fawell**. Mr. Chairman, I just wanted to clarify. Obviously, disparate impact is based on the differences between the relevant employment pools. I did specify to the gentleman from Texas that it would be on the basis of qualified, relevant, employment pools.

Now, that obviously wouldn't be 50 percent, but it obviously would be a large group of women who would be qualified, much more than 35, we all would agree. Therefore, there is, on statistics alone, obviously a large disparate impact insofar as——

Chairman **Ford**. But that disparate impact will not, by the pure language of this bill, establish a prima facie case of a violation of the act for disparate impact. It is only a factor and cannot be used to establish, as you said, a prima facie case because we prohibit it.

Mr. **Henry**. Would the Chairman yield for just a brief——

Chairman **Ford**. Yes.

Mr. **Henry**. I think part of the confusion is that both sides are right. I am simply reading the committee report. Here is the committee report on this issue on last year's bill, and I quote. "Statistics may still be used to make a prima facie case of disparate impact. Indeed, such cases usually rely on statistics. But—" and the "but" is equally important. "But statistics must meet the requirements of the law. Mere statistical imbalance without more will not suffice to establish a prima facie case."

So, it depends of how you are approaching the question. I want to just suggest one thing, Mr. Chairman, and then I'll—take this on my time on the round, and then you can scratch me off, if I may.

I very much appreciate, and I want to say this, the way we handled last week's hearing and thus far today, we are handling a civil rights bill civilly, which is the only way we are going to make progress.

I want to express my appreciation to the witness—my daughter lives in Brooklyn, so thank you for what you are doing for her as well as several other million people there.

I am very much concerned about technical issues that are going to have profound legal consequences. I am looking at the language in the old *Griggs*. Where *Griggs* created problems, it established the disparate impact standards, but it used different sets of language, business necessity, related to job performance, manifest relationship. Each of those are different standards.

They are related, but if you use any one in isolation you are going to get a different output on a disparate impact. Most of the attack on this bill this year and last year was in backing away from simply using the word "manifest relationship" in developing a new standard. In this year's bill, in Section 3, we talk about the practice or group of practices bearing, "a significant relationship to successful performance of the job."

This makes imminent sense as well. But, let's say that what we are trying to do is simply restore *Griggs*. Wouldn't it be better to use the language of *Griggs*? Or do we further obfuscate now that we have another set of language which just because it is a new set of language is going to create ambiguity in the law.

Let me point out that in Section 3, we even used the language differently between Section 3, sub(o)(1)(a) and (b). We define, in the case of employment practices involving selection, "The practice or group of practices, must bear a significant relationship to successful performance of the job."

Then in (b) we say in the case of employment practices that is, vis-a-vis, selection, we have a different standard, significant relationship to a significant business objective of the employer. How do you separate employment practices not involving selection, and measuring it on a significant business objective of the employer, then the hiring, employment practice, based on significant relationship to successful performance on the job?

I am really just trying to throw out what my concerns are, Mr. Chairman. You know, I am trying to deal in good faith. I just raise that, and I will pass on the next round. I have used my time.

The issues before us in many cases are of this sort, and it is going to demand the utmost reasonableness to keep the doors open, to really say what we mean in trying to address this.

Mr. WASHINGTON. Would the gentleman yield?

Mr. HENRY. I would be pleased to, but it is really the Chairman's time. Thank you.

Mr. WASHINGTON. I just want to throw out another question to you. Going back to what you suggested would be the more excellent way of addressing the question of *Griggs* vis-a-vis the language in the bill, how do you get around reinterpretation, if you will, of *Griggs* by the court in *Wards Cove*? I think that is the problem. You can't go back and use language that has been interpreted in a way other than what we intend because we don't do anything then.

The Court has clearly taken the language in *Griggs* on manifest relationship and added something to it, "significantly serves the legitimate business needs of the employer." We can't pretend that that doesn't exist by going back and saying that once more the Congress reasserts the language of *Griggs* by requiring a manifest relationship and leaving it at that, because then we leave the *Wards Cove* case hanging out there, and the doctrine of legislative construction would be that the Congress obviously knew that the *Wards Cove* case existed at the time.

I think we would be right back where we are; don't you think?

Mr. HENRY. Let me just add to that. One of the other issues vis-a-vis *Wards Cove* versus *Griggs* is burden of proof of the employer. I mean, under *Griggs*, as I understand it, remember I am not an attorney as my friend from Texas is, the burden of proof rather directly manifestly rests with the employer, and justification.

The burden of proof shifts between *Griggs* and *Wards Cove*, as I understand it. Here, we return it with new language on process of discovery, and that is because when the original act was written we didn't spell out those things, so it becomes new language, new language means litigation. Be that as it may, that is inevitable no matter what you do.

I want to be sure that if you are going to resurrect a process of discovery that impacts on an employer, we do it in such a way that an employer isn't burned with the legal necessity of trying to prove a negative, which as you know, is logically impossible.

That is to say, that the employer is put with the legal burden of trying to show that there is no other hypothetical means of establishing significant relationship, be it business necessity or whatever it may be——

Mr. WASHINGTON. If I may stop you there, that is the second problem. I think you raised a very interesting question, because without this bill the employee has to prove a negative, that is, the nonexistence of a business reason on behalf of the employer.

The prong that you suggested, the second one—if there is proof of discrimination, and then the employer before *Wards Cove* is then required to come forward and show that there is a business necessity for the physical examination that this lady was required to pass, even though she passed the examination, then the question that you raised only comes in whether there has been proof of the other two.

It seems to me that that is an area where we could perhaps level the playing field between employer and employee. I think the threshold question is: Whom do we feel—just assume that *Griggs* had never been decided, and assuming that *Wards Cove* had never been decided—and just logically think that we are trying to write on a clean slate, and sitting here as intelligent people.

Between the employer and the employee, whom do you think is in the best position to be able to justify tests that they put out there for an employee to be able to pass before they get a job; the employee who is seeking the job or the employer who brings up the test to begin with?

I think that that answer is so logical, that it doesn't need an answer.

Mr. **Henry**. I thank the Chairman very much.

Mr. **Hayes**. Mr. Chairman, if I could raise a privileged question with you?

Chairman **Ford**. I was just going to recognize you, so go right ahead.

Mr. **Hayes**. I've been recognized once. Are we going to apply the five-minute rule to us here on this side of the question?

Chairman **Ford**. I'm afraid we'll have to if we are going to get through the rest of the panel, because the——

Mr. **Hayes**. Because some of us try to adhere to it, and other seem to——

Chairman **Ford**. The discussion most recently that has been taken care of, will probably be addressed by most if not all of the people on the next panel who are the technical experts in this field and can, I'm sure, can tell us how many angels can dance on a head of a pin. That is the kind of people we have on this second panel.

Mr. Sawyer?

Ms. **Berkman**. Mr. Chairman, if I could just say one thing in response to the point that Mr. Washington made?

When I was challenging the New York physical exam, the city was required to come in with their evidence of justification for the requirements of the exam.

It was only after I came on the job, many years after I came on the job, that I was told by the incumbent firefighters who were used to norm the exam that they were told by the city, when they were running through it, that this was the first test that women were going to be allowed to take so they should go all out as fast as they can, not to perform in the method that they performed on the fire ground, but to go as fast as they can in order to make it as difficult as possible for women to come on the job.

There was no way that I could find out that kind of evidence of intentional discrimination. In fact, I never did find out that evidence of intentional discrimination until long after I had come on the job. It is virtually impossible for plaintiffs to dig up that kind of evidence.

Chairman **Ford**. Mr. Sawyer?

Mr. **Sawyer**. Thank you, Mr. Chairman. I am going to beat the red light by a wide margin, I hope.

I just wanted to thank the witness for your attention to the technical detail and the implications of items that are measured by testing instruments, standards of physical performance.

I used to be the mayor of a mid-sized American city, and despite sympathetic policy-makers and fire administrations that were seeking to bring women on to the force, it became difficult to establish those kinds of test instruments in the face of tensions within the incumbent forces.

Despite that, as of yesterday that city of 223,000 people has four women firefighters, and we are proud of their performance and look forward to their service. It is in no small part due to the kinds of efforts you have made, and I just wanted to thank you for that.

Ms. **Molinari**. Thank you, Mr. Chairman. I, too, just want to thank Brenda for coming forward today, sharing her story, but most of all for making and being willing to make the ultimate sacrifice to protect our community. I just want to thank you for being here today.

Chairman **Ford**. Ms. Lowey?

Ms. **Lowey**. I, too, want to thank you for appearing here today. As a former Bronxite who now represents Westchester County, I certainly appreciate the challenges that you have been put through.

I support you and recognize what an enormous effort it has taken for you to pursue your dream, and now that you are willing to help others pursue theirs.

When I was at the New York Department of State, before I came here, in fact, we were very involved in supporting women in nontraditional jobs. In fact, I don't know whether you remember, but there was a very aggressive program, which we funded, to train women sanitation workers. The Sanitation Department of New York insisted that women couldn't hold those huge garbage pails, although we have to very often take them out in the morning, nor could they hold that bag and swing it over into the truck.

It was a marvelous program to see, and I want to tell you almost a hundred percent of those women that we trained eventually were admitted to the Sanitation Department of New York City.

We also trained women to install windows when we were running a weatherization program, so we know that a lot of these tests are questionable.

In reading your testimony, and I apologize for coming late and not hearing your excellent testimony, I was particularly taken by the fact that in 1982, there were 39 other women that were hired and that since 1982, there hasn't been a single woman hired. What justification does the city give for this? Is there any justification, or don't they feel they have to justify it?

Ms. **Berkman**. As I mentioned in my testimony, this also goes to the fact that I don't think you can argue that a defendant employer has absolutely no chance of defending a test under the *Griggs* standard or under the proposed standard. They were successful in defending a speed-to-completion, rank-ordered, physical test, which women are passing but not scoring high enough to actually be hired.

It has had a tremendous negative impact on the hiring of women. As I said in my testimony, I completely disagree with the outcome of that case, but it is a fact that that is the standard that is being used, even though, previous to women being allowed to take the firefighter exam, the department had a pass-fail standard. They did not have a rank-ordered standard.

Ms. **Lowey**. Now the other thing I was interested in, in reading this, is what specific business necessity did the city point to in justifying that test which excluded all women and in what specific way is that test now much easier to justify under the *Wards Cove* decision?

Ms. **Berkman**. Well, they gave as a justification, of course: we need the strongest, fastest firefighters. But they were arguing that the mechanisms that they were using to select those people were the correct mechanisms. We did not specifically dispute the fact that you needed very qualified people to perform the job. We just said that the mechanisms which they were using to select those people were not, in fact, job related, that their own incumbents could not pass their existing standards.

Ms. **Lowey**. Exactly.

Ms. **Berkman**. Under the standard of *Wards Cove*, my understanding would be that the city would have a much easier time defending their tests than they had in 1979 when I brought my lawsuit.

Ms. **Lowey**. One of the things that interested me is whether or not the eight-foot wall climb is now easier to justify?

Ms. **Berkman**. That is gone. That was thrown out in my first lawsuit. That is gone.

They came and they testified—the city put their own witnesses on and on cross-examination they asked the firefighter on the stand, "How would you go over an eight-foot wall?" And he said, "Well, first I would pick up something from the roof that is generally lying around. I would set it next to the eight-foot wall. I would stand on that, and I would pull myself over."

There was no justification for having people be able to jump over eight-foot walls. In fact, in firefighting you are wearing a 35-pound air pack. You are weighted down with approximately 50 pounds of protective equipment. People are not jumping over eight-foot walls.

Ms. **Lowey**. I see that red light, and Mr. Hayes, I am going to certainly relinquish my time. Thank you very, very much.

Chairman **Ford**. Mr. Klug?

[No response.]

Chairman **Ford**. Ms. Unsoeld?

Ms. **Unsoeld**. I just want to add my thanks to those that you have already heard. It is not easy being a pioneer, and we appreciate your role in helping pave the way for those that will follow. Thank you.

Ms. **Berkman**. Thank you very much.

Chairman **Ford**. Mr. Gunderson?

Mr. **Gunderson**. Thank you, Mr. Chairman. Let me join everyone else in saying thanks for coming and thanks for what you are doing.

My question focusses rather, however, on a couple of statements or lines in your statement. In particular you say, "Without Title VII, without the *Griggs* decision, and without the disparate impact theory,"—it is the last sentence of your statement—"I never would have been able to achieve that dream."

My question to you is: What in the proposal by the administration would not also allow you to achieve your dream? The administration obviously keeps Title VII. It codifies *Griggs* and obviously keeps the disparate impact theory.

I am just trying to determine if we aren't all in agreement on this element, in your opinion?

Ms. **Berkman**. I haven't seen the language of the administration's proposal. So, all I can say is that my understanding of it is that it does not overturn the *Wards Cove* decision.

Mr. **Gunderson**. Let me follow this up on this discussion, and I regret that not everybody has a copy of the administration's proposal so we could have an intellectual discussion here.

Let me read to you the definition of business necessity in the administration's proposal. It means that "the challenged practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by, even they do not require the challenged practice."

My reading of this, is that the test that you challenged, in my opinion and I think your judge's opinion, clearly does not have a manifest relationship to the employment in question, and it certainly does not significantly serve legitimate employment goals. So, it would seem——

Ms. **Berkman**. With all due respect, I am not practicing law now. I am not a discrimination lawyer. I haven't seen the administration's language, and I haven't had an opportunity to study it. I would prefer not to discuss it at this time, given that I am not completely familiar with it.

Mr. **Gunderson**. That's fine.

Chairman **Ford**. Will the gentleman yield to me?

Mr. **Gunderson**. Sure.

Chairman **Ford**. It comes as a surprise to me that there is a civil rights bill that is floating around that is "the administration bill." Can you give me the bill number? Has anybody introduced it for the administration?

Mr. **Gunderson**. It was sent to the Speaker on March 1st.

Chairman **Ford**. Well, surely, they don't expect the Speaker to introduce their bill. Has any Republican——

Mr. **Gunderson**. In these days of bipartisanship anything is possible, Mr. Chairman.

Chairman **Ford**. Are you or is somebody else going to introduce the administration's bill so it will come to us and be considered when we mark this bill up?

Mr. **Gunderson**. It is my understanding it is going to probably going to be introduced later this week. You will love this, Mr. Chairman. The Speaker got a copy of the bill before the House Republicans did.

Chairman **Ford**. Well, that's not new. Don't forget there have been times since I have been here when the president was from my party, so I know how you feel.

All right, we will look forward to seeing what it is. I am told by rumor that as a matter of fact, part of the argument we had here this morning, particularly Mr. Henry's reference to burden of proof, is disposed of by the administration adopting the exactly the same approach that H.R. 1 does.

There may not be as much difference between us as would appear.

Mr. GUNDERSON. I think we are going to find ourselves focussing probably more on the damages section of last week's hearing than we are on language here, which is the reason I brought up the particular language on the definition of business necessity, as we discuss this particular point.

Mr. WASHINGTON. Will the gentleman yield?

Mr. GUNDERSON. You bet.

Mr. WASHINGTON. If we use the—not the hypothetical, but the actual case history from Ms. Berkman's case and use the definition in the administration's bill, of which I have a copy—I'm concerned about the part that says, or that "the respondent's legitimate employment goals are significantly served by, even if they do not require the challenged practice."

Let's go back to the eight-foot wall. That means, the way I read it, and I don't hold myself out as being much of a lawyer, and certainly not a Constitutional scholar, but couldn't almost any lawyer make a good argument that after the testimony is in the record that she made a high score on the exam, she qualified, but she and all the other women failed the physical exam—couldn't you come in, when you prove the fact that you have this eight-part physical examination, and stand up before the court and say, "Your honor, I have made a case that even though they have proven that these physical exercises are not required, they certainly significantly enhance, that is, although you don't need these to be a firefighter you are better off if you have them as a firefighter.

Wouldn't that fit the definition that they are not required to challenge practices, i.e., the physical examination, are not required that they significantly serve the goal of being the best firefighters for the city of New York that you have.

Mr. GUNDERSON. Two responses. First of all the exact language of "significantly served by" is taken from the *Beazer* case.

Second, reading the judge's rulings in Ms. Berkman's case, I am concluding that that judge would rule under "significantly served by" the same way she ruled in this particular case that it cannot and does not significantly serve the cause of competent firefighting to have the eight-foot wall test.

So, it would be my assumption, or my conclusion, that this language would be used just as that in Ms. Berkman's case, because the judge used the *Griggs* language if I understand Ms. Berkman's statement correctly.

Mr. WASHINGTON. Yes, but I think you are sliding off the edge of *Griggs*. What you are saying then is, if you can prove that it makes a good firefighter to run the 40-yard dash in ten seconds, that it doesn't make a better firefighter to run the 40-yard dash in eight seconds?

Mr. GUNDERSON. I think that Ms. Berkman indicated this earlier when she talked about the information she has received from other firefighters when they were told to go all out in the test to make sure that there would be the difference between men and women.

The judge looked at the other evidence and said, "Just because a man can climb a higher wall does not make him a better firefighter." I think that gets to: Is this practice "significantly served by."

Firefighters don't need to climb eight-foot walls. She has proven that case. "Significantly served by" means just that. I think we can reach a consensus on this.

Mr. WASHINGTON. I think we are close, but the difference that I see is that, "employment goals are significantly served by," it seems to me is a Catch-22 that allows an individual—if you agree that some sort of physical stamina is required.

The question here is that the threshold was placed so high that it was unreasonable in relation to the job that firefighters were required to do. So, if you start from the assumption that some—I mean, I am 49 years old. I could not be a firefighter. I don't have the stamina to do it.

There is some reasonable relationship between some amount of stamina and the ability to do the job. The question is: Do you place it beyond the reach of women? And the judge said no, but again if you allow, not business necessity, if you will, but employment goals significantly served by——

Mr. GUNDERSON. But don't forget the——

Mr. WASHINGTON. [continuing] not required but not——

Mr. GUNDERSON. Don't forget the words "legitimate employment goals." Not the employment goals that a city establishes to maintain the status quo. We are in a court of law where you have to have legitimate business goals.

Mr. WASHINGTON. We are talking about unintentional discrimination. We are not talking about intentional discrimination.

Mr. GUNDERSON. I don't know. This sounded like an intentional discrimination to me.

Mr. WASHINGTON. Pardon me?

Mr. GUNDERSON. As I listened to her case, it seems to me some people in the city and some people in the fire department were practicing what I would call intentional discrimination.

Mr. WASHINGTON. I would agree, but I think the abundance of the evidence, and obviously the proof that satisfied the requirements the court held were that it was unintentional discrimination.

The classic beauty is that if you can prove a case of unintentional discrimination, which is easier to prove in terms of the mens rea, then you don't need to reach the question of trying to read people's minds.

In this case, it seems to me—what I want to come back to—it is a legitimate employment goal to have some physical requirements of a firefighter or a policeman or a soldier. What I am concerned about is, once you put that in and you say that these are "significantly served by" but not required, you open the back door, if you will, to allowing the same kind of conduct.

If you relate it directly back to this situation, one could definitely argue that some sort of physical stamina or a physical examination in addition to the written examination would serve the legitimate goals of the New York City Fire Department.

The question is, how high are those goals and whether you are building a barrier. The problem that I have is with the administration's language on "significantly served by, but are not required." We all agree that the ones that are required that are legitimate requirements ought to be included.

Mr. **Gunderson**. Everybody in the room needs to know I am not even a lawyer, say nothing of a Constitutional lawyer, so I am really handicapped in this discussion.

If I look at this language, it seems to me that there are two tests. "Legitimate employment goal" is one test, and second, "significantly served by."

Now, it would be my conclusion that the eight-foot wall and the other physical tests are, frankly, not a legitimate employment goal, but let's assume for discussion they are legitimate employment goals. You then go to the second test. Are they significantly served by the challenged practice?

In this case, it is my conclusion that the tests that were used for the New York Fire Department don't meet either test.

Mr. **Washington**. Mr. Chairman, may we go ahead and start on my time?

Mr. **Sawyer**. [presiding] I think we have.

Mr. **Washington**. I haven't been recognized yet.

Mr. **Sawyer**. Perhaps we should continue on to the second panel.

Mr. **Washington**. What is the chair's position?

Mr. **Sawyer**. Perhaps we ought to recognize Ms. Mink.

Mr. **Washington**. Has the Chair recognized me?

Mr. **Sawyer**. I don't know. Perhaps we haven't.

Ms. Unsoeld, have you been recognized?

Mr. **Washington**. She was the last person on the Democratic side that was recognized. Mr. Gunderson had the time.

Mr. **Sawyer**. I'll be happy to recognize you, Mr. Washington.

Mr. **Washington**. I certainly appreciate it, Mr. Chairman.

Mr. **Sawyer**. Mr. Washington.

Mr. **Washington**. Thank you, Mr. Chairman.

Mr. Gunderson, are you leaving?

Mr. **Gunderson**. I was.

Mr. **Washington**. [To the witness.] Do you consider yourself to be unique?

Ms. **Berkman**. Unique?

Mr. **Washington**. Yes.

Ms. **Berkman**. No.

Mr. **Washington**. You are not the only one of 35 women in the city of New York that could do a good job as a firefighter; are you?

Ms. **Berkman**. Absolutely not. The reason that I initially was compelled to bring my lawsuit was that I did not believe that there was not a single woman in the city of New York that was unequipped to be a firefighter.

Regardless of my own personal capacities, at that time I felt I was physically equipped to be a firefighter, but I also couldn't believe that there was not a single other qualified woman.

Mr. **Washington**. Now, let me ask you another question. Since becoming a firefighter, have you been restricted in the kinds of jobs that you have been assigned to do, based upon the fact that you are a woman?

Ms. **Berkman**. Absolutely not. I have performed all the jobs that I have been assigned to do.

Mr. **Washington**. So that means that even though other women can't pass the barriers that are put up, and they are not firefighters, they fit into the same class as you, that is, if they could ever get over these hurdles they could do the job, you are satisfied?

Ms. **Berkman**. That's right. As I mentioned in my testimony, in many cases departments did not even have a physical agility test before women were allowed to apply. They just didn't—and they were only constructed in order to become barriers to women getting on——

Mr. **Washington**. It was just a coincidence? Just as it is a coincidence that at the same time that women started to apply for these jobs, the fire department found it necessary to put in some additional qualifications.

Let me ask you this. How many years do you have to work for the New York Fire Department in order to retire?

Ms. **Berkman**. Twenty years.

Mr. **Washington**. Twenty years, so if you had a 20-year-old female, and a 39-year-old male who drinks beer and who doesn't stay in good shape, as far as the physical agility tests are concerned, whom do you think would be more appropriate, in terms of the ability to pass it, not only to pass the test, but to do the job of climbing a ladder and saving someone from a building—a 20-year-old woman or a 39-year-old man?

Ms. **Berkman**. There are clearly unfit people of both sexes who are not capable of performing the job, just as there are fit people of both sexes that are capable, so you can't automatically say that this woman is incapable. That is a stereotype. You can't say that this man is automatically capable. That is another stereotype.

Unfortunately, that is what has happened in the fire service. They have assumed that men of certain capabilities are automatically qualified, whereas women as a group are not qualified ever.

Mr. **Washington**. Let me ask you another question in another area of the bill. Let me just give you a hypothetical. I don't want to go into any real life experience.

Let's assume that you and other ladies in the fire department find it necessary to put up with offensive sexual remarks and gestures and things of this nature. Do you have a remedy under Title VII, under existing law? Since you work there you can't get back pay because you are on the job; right? So, you have no damages. You have no remedy; is that right?

A black person who got hired the same day as you did, who is subjected to offensive racial remarks, would have a remedy under Title 42, United States Code, Section 1981; is that right?

Ms. **Berkman**. Women's remedies are far less. What we have found repeatedly is that even when you bring a complaint, and even when the perpetrator of the improper practices is found guilty, that very often that is not sufficient. The person will continue to perform those illegal discriminatory acts because there really is no penalty for doing that.

Mr. **Washington**. One other thing that relates to that, too—I think my time is about to expire. Once you got inside and you saw and you talked to these other folks, and you found out what really went on, and you related that experience in terms of the agility test and all of that, and how they composed them, who hadn't passed and what they were told when they first took them—all that just smacks of the good old boy network; doesn't it? You've got to be inside to be a good old boy whether you are a man or a woman; is that right?

Ms. **Berkman**. I must say that I am much more cynical about the hiring practices of the fire service than I was when I first applied for the job.

I really feel that many of the standards which have been put into place are put there purely to keep people who are different from the existing, the incumbent, fire force out of the job.

Mr. **Washington**. That is called discrimination; isn't it?

Ms. **Berkman**. That's it.

Chairman **Ford**. Mrs. Mink?

Ms. **Mink**. Thank you very much. I must add my words of commendation to you, Brenda, for your outstanding leadership in a field that is extremely difficult and which has been made almost impossible to contend with in view of the current decisions.

I am struck by the fact that since 1982, according to your testimony, no woman has been added to the firefighting lists in the city of New York.

Ms. **Berkman**. Correct.

Ms. **Mink**. Now, if H.R. 1 passed and became law, is it your testimony that this would alter the situation in New York and in other places in the country? If so, by what measure?

Ms. **Berkman**. I believe it would alter it. I think that women would once again feel that they have a shot at winning this kind of a discrimination case.

As I mentioned before, the national organization of women firefighters has basically been advising people that it is extremely difficult to win under the *Wards Cove* standard, and some of the other Supreme Court decisions that have been recently put in place.

The Civil Rights Act is critical to restoring that balance where a plaintiff has an actual opportunity to make the defendants prove that there is a business necessity for this practice.

I think Representative Washington's point was very well taken that under certain language there could be any kind of a justification. You could argue that what we need out there in the fire service is a superman, because after all, these are life-saving decisions, but when, in fact, the incumbent fire force is performing very satisfactorily with much lesser standards.

Ms. **Mink**. This criteria of speed and explosive strength, in your opinion, is the factor that is now barring the hiring of women because they don't score high enough to be in the higher rank order than the males who take the same test; is that the situation?

Ms. **Berkman**. Unfortunately, in New York, the test tests now exclusively for speed, and that is a criteria as to which women as a group are going to have a more difficult time competing with men as a group. If in fact the test tested for the full range of relevant abilities that are required by firefighting—flexibility, which disables our fire force more than any other factor, back injuries are the single most disabling factor; stamina, heart attacks are one of the greatest disablers of firefighters; and hand-eye coordination; the full range—then women would have a much better shot.

They would still be disadvantaged if there was a speed component, and we are not arguing that there should not be a speed component, but we are saying that the test now focuses exclusively on one aspect of firefighting, which it should not, and it is not purely job-related. If in fact the full range were included, women would have a much better opportunity to be hired.

Ms. **Mink**. To what extent is this emphasis on speed maintained throughout a person's tenure in the fire department? Do they have periodic tests in which they exclude the men from participating in firefighting because they can't maintain the level of speed required for an entry-level firefighter?

Ms. **Berkman**. Absolutely not. Absolutely not. This is what I am talking about when I say arbitrary and artificial barriers, because in New York you take this one test, and you can sit on a list for five years, and you go directly into the academy. You are not required to take any other test before you go into training.

So a person can become a couch potato, sit around throwing back six-packs and potato chips for five years, and they will go into the fire academy, it doesn't matter what kind of shape they are in. Once you get on the job, there are absolutely no physical criteria. You are not required to perform an annual test in New York. You are not required to show that you have maintained your physical capabilities at all.

Ms. **Mink**. One final question before the red light goes on: I wanted to ask, under what jeopardy are you today because you came to this committee to testify about the department and its current policies and criteria for hiring, understanding the fact that you were once terminated because of a stand you had taken earlier? Are you in jeopardy today because you are here to help this committee arrive at a fair bill?

Ms. **Berkman**. I am always nervous about speaking my mind on the fairness of fire service entry-level standards, because I have been retaliated against on numerous occasions, starting with my being terminated—well, starting way before I was terminated in my first year of employment. It never really stops.

There are a large number of people in the fire service who do not believe that women belong in the fire service any more than they believe that women belong in combat. And they take offense at anyone who speaks differently on that issue. Needless to say, whenever I testify in this manner, I am under an incredible amount of criticism.

My department made very clear to me today that, when I came down to testify, I was speaking on behalf of myself and the national organization; I was not speaking on behalf of the New York City Fire Department.

Ms. **Mink**. What is the highest rank that a woman has achieved in the Fire Department in New York City?

Ms. **Berkman**. Firefighter. There has not been a single woman promoted in the nine years that we have been on the job.

Ms. **Mink**. Thank you, Mr. Chairman.

Mr. **Sawyer**. Thank you very much.

Mr. Jefferson.

Mr. **Jefferson**. Ms. Berkman, most of the important questions have already been asked. That is one of the plights of a new member. But I want to try and see if you can help me clarify just a few things, if you would.

You have read H.R. 1, have you not?

Ms. **Berkman**. I have glanced through it very briefly, yes.

Mr. **Jefferson**. Okay. Well, I know you have made some disclaimers about your continuing practice of the law. But early on there was some discussion about the quota issue that we have heard so much about with respect to this bill.

The point has been made that statistics alone do not establish a prima facie case under the act by its clear language, and reference was made to Section 4 of the bill—I don't who made it—but some reference made to Section 4 as establishing a statistical basis for proof.

If you read this Section 4 on page 5, in subparagraph (a), on page 5, it talks about the complaining party demonstrating disparate impact, but then it uses "and"—it is a conjunction here—and the respondent fails to demonstrate that such practice is required by business necessity.

Doesn't it seem to you that there is no separation there between the one and the other, that in fact both are required to make out the prima facie case.

Ms. **Berkman**. That would be the way I would read it, yes.

Mr. **Jefferson**. It is impossible under this law, as I see it, to establish an unlawful employment practice without both of these standards being met, both that there is disparate impact and that there is a failure to demonstrate a business necessity.

Ms. **Berkman**. Without having access to all the discussions that have gone on before today, I would assume that the "and" means that both are required.

Mr. **Jefferson**. Yes, it would seem so to me. I just wanted to see what you thought about that. You say you work as a trustee for United Women Firefighters. Is that just a New York City-based organization.

Ms. **Berkman**. There are two organizations. I am president of the United Women Firefighters, which is the local New York City organization for women, and I am a trustee of Women in the Fire Service, which is the National organization of women firefighters.

Mr. **Jefferson**. In your capacity as a trustee for the National organization, do you have information you could share with this committee about the interest in litigation over this issue that women have around the country, about whether there are suits that would be brought if the standards were different, and if so can you quantify that in some sort of way to give us a sense of how frustrating it is for women all over the country who don't have an option now to bring their actions under the present state of the law?

Ms. **Berkman**. Prior to some of the more restrictive Supreme Court interpretations of Title VII, we had seen basically a ripple effect, a very positive ripple effect, from some of the litigation that had been brought in the early 1970s and late 1970s. Departments were complying on a voluntary basis in many cases.

After the more restrictive decisions, and including some very restrictive interpretations at the lower court levels, we have seen that there is not much movement of a positive nature and that women, when they consider challenging the exams in court, are very put off by lawyers and by our national organization, in terms of the chances of success. They feel that, under the current standards, there is much less chance of success, in terms of bringing a lawsuit, than there was when I brought mine.

Mr. Jefferson. It is not because there are less grounds for complaints?

Ms. Berkman. Not because there is less need for the litigation or because there is less discrimination going on, but because the legal standards have been changed to make it almost impossible for a plaintiff to be successful.

Mr. Jefferson. My question was, do you have any information to measure how much discrimination is going on out there and that would be manifested but for the fact that we have the standards as they are?

Ms. Berkman. Well, we know that there are tremendous numbers of women who are interested in fire service careers, and yet we only have less than one percent women actually on the job. In most cases, departments have no women or only one woman on the job, and that woman who is on the job was, in many cases, hired long ago, in the 1970s, when the standard was different.

Mr. Jefferson. Thank you.

Mr. Sawyer. Thank you very much for your testimony today. You have been patient and thoughtful and focused in your response, and I am sure that all of the members of the committee, on both sides, are grateful for your presence here today.

Ms. Berkman. Thank you. I just want to reemphasize again how critical this kind of legislation is to the continued progress of women in nontraditional employment. I appreciate very much the opportunity to speak. Thank you very much.

Mr. Sawyer. Thank you very much.

Our second panel is made up of Ken Kimerling of the Puerto Rican Legal Defense and Education Fund; Dr. Ben Schneider, the American Psychological Association; David Rose, former chief of employment litigation, U.S. Department of Justice; Mark Dichter, law firm of Morgan, Lewis & Bockius; and Professor Pamela Perry, the Rutgers University School of Law.

Let me say welcome to all of you and that the same standards apply as was the case with Ms. Berkman. Feel free to comment, summarize, expand upon your testimony in any way that you feel will illuminate it. Your full testimony will remain part of the record at the point at which it is presented.

Mr. Kimerling.

STATEMENTS OF KENNETH KIMERLING, ESQ., PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, NEW YORK, NY; DR. BENJAMIN SCHNEIDER, AMERICAN PSYCHOLOGICAL ASSOCIATION, WASHINGTON, DC; DAVID ROSE, ESQ., FORMER CHIEF, EMPLOYMENT LITIGATION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; MARK DICHTER, ESQ., MORGAN, LEWIS & BOCKIUS, PHILADELPHIA, PA; PROFESSOR PAMELA PERRY, RUTGERS UNIVERSITY SCHOOL OF LAW; CAMDEN, NJ

Mr. Kimerling. Mr. Chairmen—I see there are two of you right now. I want to thank you both for letting me come down here today. I am honored to be before this committee. I am honored to share a panel with Brenda Berkman, who is one of the heroes of Title VII litigation, and David Rose, who is another hero of mine in Title VII litigation. Both of them, I think, exemplify what the Civil Rights Act of 1964 was all about.

I am here today on behalf of the Puerto Rican Legal Defense and Education Fund. The Puerto Rican Legal Defense Fund was founded in 1972 to further and ensure the rights of Puerto Ricans and other Latinos in this country. The plight of Puerto Ricans I think is well known to the members of this committee. I have put in my statement some of the statistics, but the unemployment rate for Puerto Ricans is almost twice that of non-Latinos, and that includes African-Americans as well.

Almost 40 percent of Puerto Rican families are below the poverty limit, as compared to less than 10 percent of non-Latino families. Obviously, Puerto Ricans and other Latinos need an equal opportunity to obtain employment. Title VII used to be one of the mechanisms that provided that opportunity. As a result of *Wards Cove* it has become clearly much less so.

I am here, obviously, to support H.R. 1. I think it is very important legislation, not only for the *Wards Cove* issue but for the other issues that it addresses. I am going to limit my remarks to the *Wards Cove* issue, because I think that is perhaps the most important component of Title VII and certainly one of the more important components of H.R. 1.

There was last year a very excellent committee report that I think as well as any document that I have seen demonstrates why H.R. 1 should pass. It clearly demonstrated why the Civil Rights Act of 1990 should have passed, and, unfortunately, we are back here in 1991 trying to get the same thing done. The debate now seems to be narrowing down to some discussion over what is business necessity, as *Griggs* used that term.

I believe that the standards in H.R. 1 are an adequate description of the standards that existed before *Wards Cove*, both in *Griggs* and the cases that followed it. It provides a standard that is fair, both to the employer and to the plaintiff, but it is a standard that has some teeth, unlike other ones that I am going to talk about shortly.

I think I want to emphasize in my testimony that, although I am a lawyer, I don't think this committee should be bogged down in trying to find the word or phrase in *Griggs* that encapsulates what is disparate impact litigation. I think that clearly it is not a statute. The Court in *Griggs* was not trying to write one or two words that would mean everything that it was trying to say in hundreds of words.

Griggs is the first of many Title VII cases, both in the Supreme Court and the lower courts, that interpreted Title VII and applied its disparate impact standards. To take a word from the Chairman, I don't think we should dance around on the head of a pin; we should look at what Title VII sought to accomplish in the words of *Griggs* and put forth a standard like the one in H.R. 1 that accomplishes that purpose.

I think it is significant that—although it is not, obviously, before the committee at this point—the President's proposal goes back dramatically from his position in his veto message of last year. There is a chart that I think counsel for the committee had prepared. I think it is an excellent document to look at when you consider where we are today and where we have been.

The legislative words in H.R. 1 track in large measure the words that the President used in his veto message as a proposal for the definition of business necessity. I think that should put to rest any claims that this legislation would create a quota bill. I am confident that the President, who was concerned that the Civil Rights Act of 1990 would be a quota bill and proposed his own legislation, was not proposing legislation that he thought would have been a quota bill, yet he used words very similar to the ones that are being proposed in H.R. 1.

He has now, obviously, decided that *Wards Cove* should not be reversed and *Griggs* restored. There is no provision to that effect in his current legislation, unlike H.R. 1. He, obviously, having won the war, thinks that he can win everything and has disregarded the needs of women and minorities in this country. This proposed legislation is almost worse than nothing. In many ways, some of the other elements are clearly worse than the current situation.

There is an emphasis on a manifest relationship. I ask this committee to think what it is that "manifest relationship" means. It has no meaning in the concepts of job-relatedness. On the surface it means an apparent relationship. Well, in the testing world—and you can ask some of the experts over here—an apparent relationship is called facial validity.

What it means is, in a sanitation worker examination, you might ask a sanitation worker to determine what is the amount of garbage picked up by three trucks. And you give, you know, Truck A picked up 2.5 tons; truck B, et cetera, and then ask that worker to answer that question. Or you might say, add up 2.5, 3.2, and 4.3. The first question, because it looks like the job, is facially valid, although both of them ask you to add up three numbers.

But facial validity has nothing to do with job-relatedness if indeed the sanitation worker doesn't have to add up how many tons it is that these three trucks pick up, but the work is simply to load the truck with garbage. So manifest relationship has real problems as a standard as well as Representative Washington pointed out—I would yield my time anytime to the Representative—the second "or" standard is absolutely without any teeth. This "if not required" provision just throws it all away.

H.R. 1, as I said, does the trick. It is fair. It tracks, in large measure, the President's veto language, and it restores the law, as this committee sought to do, or this legislation seeks to do in H.R. 1.

Let me deal with one issue, I think, that probably pressed upon you last week with the compensatory and punitive damages. This is not a lawyer's bill. Compensatory and punitive damages have nothing to do with anything that anyone on this panel is going to talk about today.

Disparate impact litigation does not lead to compensatory damages; it does not lead to punitive damages. They are by definition, only available for claims of discriminatory intent. So there is no way that that provision has any effect on this litigation. It has nothing to do with employers running away and adopting quotas.

And, indeed, if the concern were that there were going to be quotas because of legislation of this type, it would be important to have compensatory and punitive damages, because someone who adopted a quota was obviously intentionally discriminating and clearly doing it knowingly, and therefore should be subject to compensatory and punitive damages.

If you want to protect against quotas, put in compensatory and punitive damages, because that will deter somebody from looking for another lawsuit, in which not only back pay would be awarded but compensatory and punitive damages. But the fact that there is compensatory and punitive damages as an element of intentional discrimination does not make it a lawyer's bill either.

As this committee is well aware, presently you can get compensatory and punitive damages for race and national origin claims under 42 U.S.C. Section 1981, yet the difficulty of proving intent is so hard that if you go and ask any clerk's office in this country how many pro se plaintiffs there are seeking to remedy employment discrimination, there are thousands and thousands of them out there, unrepresented because no lawyer in his right mind would take those cases, even with the availability of compensatory and punitive damages and even with the ability to collect attorney's fees.

If these cases were good, in terms of generating fees and money for lawyers, you would go from a civil rights bar that presently I would estimate is probably less than two per State to having a bar that looks like your negligence bar. After all, in negligence you don't have to prove intent; you just have to prove an injury and that it was somehow caused by the negligence, not the intentional act, of somebody.

In intentional employment discrimination, you have to prove intent to get compensatory and punitive damages. That is very, very difficult. Very few people prevail under that standard. Lawyers are not looking for those cases. If they were, they would have taken them, because there are lots of them out there. This is not a lawyer's bill because it doesn't bring lawyers in to intentional discrimination cases, and it is not a lawyer's bill because it doesn't change, in any way, the difficulty that lawyers already face, even under *Griggs*, in prevailing under the disparate impact standard.

Let me close by saying, I think that every day that Congress waits to reverse *Wards Cove* means another day that people like Brenda Berkman can't even think about challenging examinations and criteria for selection that have no business in being in place. I know, in our office, that we have not brought a new disparate impact case since *Wards Cove*, just because the standard that the Court enunciated in *Wards Cove* means that those cases are losers.

You cannot win those cases. In a few cases, employers are going to be so dumb as to have nothing to support them, but in almost every other case they are going to be able to prevail under *Wards Cove*.

Thank you again, Mr. Chairman, and members of the committee.

[The prepared statement of Kenneth Kimerling follows:]

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H.R. 1

THE CIVIL RIGHTS ACT OF 1991

TESTIMONY ON BEHALF OF THE PUERTO RICAN

LEGAL DEFENSE AND EDUCATION FUND INC.

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR

UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 5, 1991

PRESENTED BY:

KENNETH KIMERLING
STAFF COUNSEL

FOUNDED IN 1972 TO PROTECT THE CIVIL RIGHTS AND ENSURE EQUAL PROTECTION UNDER THE LAWS FOR PUERTO RICANS AND OTHER LATINOS.
CONTRIBUTIONS ARE TAX DEDUCTIBLE

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The Puerto Rican Legal Defense and Education Fund, Inc. is a national civil rights organization founded in 1972. Its mission is to ensure and further the civil rights of Puerto Ricans and other Latinos. We thank you for this opportunity to present our views on Civil Rights Act of 1991, H.R. 1.

The proposed legislation is absolutely necessary to the welfare of the Puerto Rican community. As the Act clearly states, "the Supreme Court cut back dramatically on the scope and effectiveness of civil rights protection." The Court's treatment of Title VII is best described by Justice Blackmun who wrote in his dissenting opinion in the Wards Cove case: "One wonders whether the majority still believes that race discrimination -- or, more accurately, race discrimination against nonwhites -- is a problem in our society, or even remembers that it ever was."[1] We are thankful that Congress has not forgotten.

Puerto Ricans on the mainland suffer from drastic problems of unemployment and poverty. For example in 1988, 9.5% of all Puerto Ricans 16 years and older were unemployed compared with 5.8% of all non-Latinos.[2] The median income for Puerto Rican families was $15,185 compared to $31,610 for non-Latinos in 1987, and 37.9% of Puerto Rican families had incomes below the poverty line compared to 9.7% for all non-Latinos. If these dismal statistics are going to change, Puerto Ricans must have an equal opportunity to obtain and maintain meaningful jobs.

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[1] Wards Cove Packing Co. v. Atonio, 490 U.S. __, 104 L.Ed. 2d 733, 755 (1989) (Blackmun, J, dissenting). Justice Blackmun was appointed by President Nixon.

[2] These data and those that follow are found in the Bureau of the Census, The Hispanic Population in the United States, March 1988, Current Population Reports, series P-20, No. 438, at Table 2, p.8.

The Puerto Rican Legal Defense and Education Fund, Inc. (PRLDEF) strongly supports the passage of the 1991 Civil Rights Act. It is necessary to restore and strengthen the protections provided by the Title VII and §1981. Much has already been written by the Committee and others about the need for this legislation; thus, this testimony focuses on some of the few remaining issues. In particular our testimony today will address section 4 of the H.R. 1, which is intended to restore the burden of proof in disparate impact cases. It is perhaps the most important provision of the Act. However, we believe that every section of the Act is necessary and important to the rights of Puerto Ricans and other Latinos.

REVERSING WARDS COVE

The focus of Section 4 of the bill is to reverse the Supreme Court's decision in Wards Cove. Among other things, that case broke with a long line of precedents of the Supreme Court and the lower federal courts that had properly interpreted Title VII consistent with its intent to prohibit the use of non-job related selection procedures that barred minorities and women from obtaining jobs, promotions and other job benefits. The Supreme Court (1) reversed the burdens of proof that had been established in the Griggs case[3] placing the burden on plaintiff to prove that a selection procedure was not significantly job-related and (2) made plaintiffs case more difficult, if not impossible, by requiring the plaintiff to point to the particular practice of a group of practices that was causing the disparate impact. The testimony will address these two points in turn.

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[3] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Business Necessity

The proposed Act properly interprets Title VII and the case law prior to Wards Cove, by requiring that the respondent in disparate impact case bear the burden of proving business necessity. There has been a great deal of debate on the meaning of "business necessity", but PRLDEF believes that the proposed legislation has accurately as possible defined that term consistent with the use by the Courts prior to Wards Cove. See, Section 3 of H.R. amending §701 of the Title VII by adding the definition of "business necessity."

We urge this Committee not to be drawn into a continuing debate over which of the words used in Griggs or in the cases that followed best defines "business necessity." Anyone who has argued a case before any court knows full well that a prior decision of that court cannot be understood by reference to one or two words used in an opinion. Judges, who have authored an opinion, continually caution attorneys not to focus or rely on one phrase used in part of the opinion. These judges know that their own choice of one or two words or phrases was never intended to cover every other case or factual situation, particularly those that have not yet arisen. Attorneys are directed to read opinions in the context in which they are written, a context that includes both the facts in the particular case and historical placement of a case in the case-by-case development of the law.

The understanding of legal opinions are in many ways similar to statutory interpretation. The language used in statutes must be read in the context of the legislative intent of the Congress. Statutes express as best the can the purposes of Congress, but in many instances the words cannot stand alone, but must be read in conjunction with the legislative history. Trying to find the one or two words that fully encompass the essence of Griggs is even more difficult. The Court was not trying to write a statute, a one or two sentence provision of particularly well chosen and debated words. That opinion like others include many hundreds of words most of which are devoted to the individual case before the Court and none of which are separately intended to be the only words which adequately and accurately describe the holding.

Thus, when this Committee goes about its job of reversing Wards Cove and restoring Title VII to its original purposes, it must consider not one or two words from Griggs but a whole body of law that spans the almost two decades that separates Griggs from Wards Cove. Without rehashing every debate over the terms used in the legislative proposals last year, we believe that the H.R. 1 accomplishes that task. While clearly the definition is a compromise that tracks in large measure the proposal of the President, it adequately approximates the state of law prior to

Wards Cove.

The term proposed by some opponents of this legislation "manifest relationship" fails to adequately describe the appropriate burden of job relatedness. What is "manifest"? It has no meaning in terms of job selection procedures. The closest it comes is to the concept of "facial validity" which means an apparent relationship to a job, but has nothing to do with job relatedness.[4] What it lacks is any sense of measurement, the degree of relationship, that is elemental element of test preparation. For example, the Uniform Guidelines For Employee Selection Procedures, adopted by the Equal Employment Opportunity Commission, the Justice Department and the Department of Labor, in describing the standards for demonstrating that a particular selection procedure is job related always use terms of degree and measurement. Even in describing content validity, which is the only method of showing that an test is job related that does not require the use of quantitative data to support validity, the Uniform Guidelines say: "The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity." 29 CFR §1607.14(C)(4). The use of the term "manifest relationship"

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[4] For example, an examination has "facial validity" if it uses the terms of the job. Thus, a test might ask someone seeking to be sanitation worker or garbage collector, to determine the total amount of garbage collected by three garbage trucks as opposed to asking them to simply add three numbers. Both measure the ability to add; but the first question *facially* appears more like the job. However, neither of the questions would be actually job related if a sanitation worker did not have to do any addition to perform the job.

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would gut the strength of the disparate impact provisions.

Group of Employment Practices

The Civil Right Act of 1991 also reverses the unreasonable burden placed on plaintiffs of identifying the exact practice among a group of practices that has caused a disparate impact. The issue arises most clearly when an employer uses several subjective selection criteria that are not given quantitative scores. Under *Wards Cove*, plaintiff would have to determine which ones caused the disparate impact, even if the employer does not know. We would be greatly surprised if many employers record either the reasons for selecting an employee or rejecting others when several subjective criteria are used. The proposed Act places the burdens where it should be. If the employer's records reflect the impact of different elements of a group of practices, then a plaintiff would have to focus on those practices that cause the disparate impact. If not, the plaintiff can rely on the disparate impact caused by the undifferentiated group. Clearly, that is the only fair and equitable distribution of burdens.

Other Issues

This is not a quota bill. Having to defend this Act against the charge that it is a quota bill, is like having to respond to the question, "when did you stop beating your wife?" I have never started beating my wife and there has never been employers who voluntarily and secretly adopted to quotas to avoid Title VII. The Justice Department ever vigilant to act in response to claims of reverse discrimination has been unable to document the use of quotas following _Griggs_. This bill simply reverses _Wards Cove_ and restores the law was established in _Griggs_ and its progeny. The standards of showing job relatedness are no different than those applied by the courts and used in the Uniform Guidelines. There is no basis to suggest that the proposed legislation is a quota bill.

This is not a lawyer's bill. There has never been a large civil rights bar and certainly never been a civil rights bar that has been made rich by employment discrimination cases. This bill will not change that state of affairs. It is important not to confuse two provisions of the Act nor to misconstrue their impact. Section 4 restores the law of disparate impact. Section 8 strengthens the law of disparate treatment or intentional discrimination. These are separate provisions and have _nothing_ to do with each other.

Section 8 makes compensatory damages and punitive damages available in cases of intentional discrimination to remedy the mental pain and suffering caused by such discrimination and to punish those who act with clear malice or reckless indifference. These damages are not available for claims under the disparate impact section, Section 4, which by definition do not involve intentional discrimination.

The addition of compensatory and punitive damages, thus cannot encourage attorneys to litigate claims of disparate impact. The nightmare of the plaintiff's attorneys scouring around to find claims of disparate impact is just unreal; nothing has changed the unattractiveness of these cases. Moreover, section 8 amendments will have little impact on the number of attorneys that currently handle claims of intentional discrimination. Compensatory and punitive damages are already available to plaintiffs for claims of intentional race and national origin discrimination under 42 U.S.C. §1981, yet there are very few attorneys representing plaintiffs because of the extreme difficulty of proving intentional discrimination. Unlike personal injury claims or business and corporate law, where there hundreds of thousands of attorneys litigating these cases all over the country, the numbers of full time civil rights attorneys in private practice in this country is probably less than 200. This bill will have no impact on that number nor on their future incomes. This is not a lawyer's bill.

CONCLUSION

PRLDEF urges this Committee to approve H.R. 1. The decisions of the United States Supreme Court must be reversed and Title VII restored and strengthened. Every day that has gone by since June 1989 has resulted in the dismissal of valid claims of discrimination and has deterred the filing of new claims. The President's veto of the Civil Rights Act of 1990 and continued resistance to any bill of substance has denied and continues to deny an equal employment opportunity to Puerto Ricans and other Latinos. Congress should act quickly to pass the 1991 Act.

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Chairman Ford. Thank you.

Dr. Ben Schneider.

Mr. Schneider. Thank you, Mr. Chairman.

My name is Benjamin Schneider. I am a professor of psychology at the University of Maryland at College Park. I am a fellow of the American Psychological Association and a past president of the Society for Industrial and Organization Psychology, a division of the American Psychological Association.

I am here representing the American Psychological Association today. APA is an organization that has now about 110,000 psychologists. These psychologists function as researchers, educators, practitioners, and a number of us work in the development and validation of personnel selection procedures.

The American Psychological Association itself has published in a number of editions, the standards for the development of psychological tests and measures. In addition, the Society for Industrial and Organizational Psychology has published principles for the validation and use of selection procedures. So both APA and the Society are heavily involved in the issues before the committee.

Both APA and the society have also supported and promoted civil rights, civil rights legislation, and are in large measure supporters of the current legislation. There is one particular section of the proposed legislation, however, that we offer some assistance and perhaps redefinition. That section does concern the discussion that has been already held this morning regarding business necessity.

In that section, our reading is that the major issue is that it must be demonstrated that the practice bear a significant relationship to successful job performance. There are three issues in that definition on which I would like to comment. The first concerns what we mean by a significant relationship.

In the field of industrial and organizational psychology and the study of tests and measures in general, significant relationship has meant statistically significant relationship. Not only for professionals in this field is that true but for lawyers and practitioners in human resources management.

The phrase "significant relationship" would be meant to be statistically significant relationship. As such, adoption of the phrase "significant relationship" would eliminate numerous practices that have evolved over the years, especially in the light of *Griggs*, for demonstrating the job-relatedness of selection procedures.

A second issue that I would like to address is the issue of the word "successful." "Successful" has too many interpretations that lead to the conclusion that there either is success or there is not success. So an unfortunate interpretation of the word "successful" could be dichotomizing performance into those who succeed and those who do not succeed.

Another unfortunate conclusion would be that the least common denominator would be acceptable for a job; that is, once you get over the hurdle of being unsuccessful, then you are automatically successful. We think that the legislation is not designed to promote either a least common denominator or a dichotomy, but, unfortunately, the present wording leads to a conclusion that that is possible.

I would now like to focus on the phrase "job performance" in the current legislation. There are many, many facets of effective behavior at work that are not immediately job performance behaviors. These include such issues as attendance, absenteeism, retention, safety, and so forth.

The current legislation, with the phrase "job performance," unfortunately connotes the production of some widgets, or whatever the immediate job is concerned with. That is a very, very limiting feature of the present definition of "business necessity," since we would all admit that issues like attendance, punctuality, retention, and so forth, are important facets related to job behavior.

Obviously, I have come with a proposal for an alternative definition of "business necessity," and I would like to read it: "The term required for business necessity means shown to be either one, manifestly and demonstrably job related; two, representative of demonstrably important components of the job; or, three, predictive of or significantly related to work behavior or behaviors comprising or relevant to the job, or job family, for which the procedure or combination of procedures is in use."

This definition promotes the potential for job-relatedness as being an important determinant of whether or not a selection procedure can be considered to be valid. It also allows, of course, for a demonstration that the job selection procedure predicts important job behaviors. It does not eliminate one or the other.

Another facet of the proposed definition is that it in many ways adds meat to the *Griggs* decision, and we think that this is an important contribution. The definition is not too complex, and it is certainly not wordy, especially given the fact that it has fewer words than the present definition of business necessity. The definition that we propose is open to fewer interpretations than the current definition and fits well within existing court cases and the existing uniform guidelines on selection procedures.

The definition tempers concerns over the *Wards Cove* decision. It is technically accurate, and it meets the standards of people who are professionals in the development and validation of selection procedures.

I thank you for listening. I thank you for allowing us the opportunity to testify. The American Psychological Association remains eager and willing to participate in drafting a rewording of the definition of "business necessity."

Thank you.

[The prepared statement of Benjamin Schneider follows:]

American
Psychological
Association

Advancing psychology as a science, a profession, and as a means of promoting human welfare

TESTIMONY OF

Benjamin Schneider, Ph.D.

on behalf of the

AMERICAN PSYCHOLOGICAL ASSOCIATION

before the

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

on the subject of

H.R. 1

CIVIL RIGHTS ACT OF 1991

March 5, 1991

2175 Rayburn House office Building

1200 Seventeenth Street, N.W.
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I am Benjamin Schneider, Professor of Psychology at the University of Maryland, a fellow of the American Psychological Association, and former President of the Society for Industrial and Organizational Psychology, APA's Division 14. I am pleased to testify today on the Civil Rights Act of 1991, on behalf of the American Psychological Association.[1]

APA is a scientific and professional organization representing 108,000 psychologists who work as researchers, educators, and practitioners in many areas of psychology, including those areas involved in the development validation and use of personnel selection practices. APA's publication Standards for Educational and Psychological Testing, and that of the Society for Industrial and Organizational Psychology's, Principles for the Validation and Use of Personnel Selection Procedures, are commonly cited as the leading scientific standards in testing and personnel selection. The Standards have been cited in several Supreme Court decisions involving employment selection and disparate impact.

APA has also been a leading force in the promotion and support of civil rights, and as scientists we understand and support the rationale and logic set forth in the Civil Rights Act. Thus, the Association is deeply interested in provisions of the proposed legislation that deal with issues of personnel selection. We believe our expertise in areas of testing,

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1 -- Testimony submitted is on behalf of APA and may not necessarily reflect the views of SIOP.

measurement, and personnel selection are most relevant to issues of employment practices in the definition of business necessity contained in Section 3.

The current definition which requires the practice or group of practices to bear a significant relationship to job performance is unduly narrow in three ways and contradicts current scientific standards and research on validity.

First, a "significant relationship" is commonly equated with a "statistically significant relationship" by employers, scientists, and all parties involved in employment selection. Despite the Committee's intentions, such language will be interpreted as prohibiting the use of a content approach to validity. Such an approach has long been recognized in scientific research, and scientific and professional standards, and is frequently used in validity studies of educational, psychological, and employment measures. A significant relationship necessitates a criterion-related or a construct validity approach, which may not be feasible in many situations.

The Standards state that validation evidence has traditionally accumulated through three recognized strategies: criterion-related, construct-related, and content-related. Inclusion of the term "significant" is troublesome in Part A, as well as Part B of the definition of business necessity.

Second, the term "successful" could be construed as establishing a minimal standard of accepted job performance rather than an "optimal" or "higher" standard of performance. Individuals perform at a variety of levels and scientifically validated employment practices permit us to estimate job performance on a continuous basis.

Certainly, prior to a flight we can all appreciate the selection of only the most qualified pilots by airlines. Likewise, employers recognize the considerable value that higher levels of work behavior offers them each day. Should an employer be penalized for hiring the most qualified candidates?

Further, in the Griggs decision, the Supreme Court stated that, "Congress has not commanded that the less qualified be preferred over the better qualified," 401 U.S., at 436. Griggs allows employers to set standards as high as they choose as long as they are consistent with equal employment opportunity policy.

Third, the term "job performance" ignores concepts such as employee absenteeism, turnover, trainability, or accident rates that are legitimate objectives of the employer. In fact, Part B of the same definition uses broader wording suggested by APA. Similar language in Part A would not only achieve consistency within the definition, but permit employers to inquire about broader aspects of work behavior. Research illustrates that these factors are often more closely related to employer profitability and effectiveness than measures of job performance and that valid measures have been developed in these areas. In addition, the term "job performance" restricts the use of measures to individual jobs rather than classes of related jobs. For the past two decades there has been little scientific support for requiring specific validation studies for each and every job in each and every situation.

In essence, we believe the specific wording chosen in the definition of business necessity is unnecessarily narrow and may result in restrictive interpretations that have no scientific basis. We also find such interpretations run contrary to well established findings in personnel selection and if implemented would turn back the clock of scientific research in measurement and employment selection by at least two decades.

Therefore, we would like to propose a definition of business necessity that is consistent with the intent and objectives of the bill, as well as established scientific standards:

> "The term required for business necessity means shown to be either or (1) manifestly and demonstrably job related, or (2) representative of demonstrably ~~one or more~~ important components of the job, or (3) predictive of or significantly related to work behavior(s) comprising or relevant to the job or job family for which the procedure or combination of procedures is in use."

This definition is a legitimate return to the Griggs definition which was applied successfully for twenty years until Wards Cove Packing Co. v. Atonio, and embodies the current state of scientific research and accepted professional standards. The definition is also consistent with the Uniform Guidelines on Employee Selection Procedures, which has been adopted by the Equal Employment Opportunity Commission, Civil Service Commission, the Department of Justice and the Department of Labor.

We have been cautioned that our proposed definition may be too complex or lengthy for legislation. Yet this definition is infinitely more precise,

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objective, and shorter in word length than the current definition. While the _Griggs_ decision was successfully upheld until the _Ward Cove_ decision, there was a substantial amount of litigation that ensued in carving out the precise meaning of business necessity. APA's definition of business necessity will put meat on the bones of the definition embodied in _Griggs._ It also allows lawyers on both sides to carefully evaluate the case short of litigation. Thus, APA's definition would reduce future litigation, while the current definition would encourage both sides to pursue litigation.

APA remains interested and willing to work with the Committee on the specific language that will temper many of the concerns rising from the _Wards Cove_ decision while ensuring that the technical and scientific issues are appropriately addressed. We also encourage inclusion of report language based on the technical and scientific discussions that we have presented in this testimony.

APA believes the suggested changes are clearly in keeping with the intent and objectives of the Civil Rights Act of 1991, which we support. It would, thus, seem in everyone's best interest -- civil rights groups as well as employers — to develop precise language that will certainly be used to guide employment practices into the next decade.

I would like to thank the committee for affording APA the opportunity to share its views with you.

Chairman FORD. Thank you.

Mr. David Rose.

Mr. ROSE. Thank you very much.

I guess I am here because I was the chief of the Employment Section of the Civil Rights Division of the Department of Justice for a long time, from 1969 through 1987. I apologize first for the several typographical errors I found in my testimony. I'm sorry. I did it yesterday, and I did not have a chance to proofread carefully.

I represent plaintiffs now in my private practice of law in some equal employment opportunity cases, but I am here not representing the views of any client but representing my own views, as I did last year before this committee.

I endorse strongly the purpose and major features of H.R. 1, and I agree that legislation of this kind is essential to restore the equal employment opportunity laws of this country to what they were prior to the series of decisions in 1989. While the other provisions of the act are important and useful, I am going to talk mostly about the *Wards Cove* provisions, that is my field of expertise, and about ways in which the problems raised by that decision can be resolved by the Congress without creating a host of new problems.

In my own view, and the view of the first witness this morning was the same, that single decision is probably the most damaging of all the five to the rights and opportunities of blacks, Hispanics, American Indians, and women.

I welcome the decision of this committee to invite the distinguished representative of the psychological profession to this committee hearing. Industrial psychologists are the people who develop tests and conduct the studies leading to the choice of the tests and the studies which show whether a test is valid or not. Their expertise, I think, is one that this committee should consider in formulating a bill to recommend to the Congress.

My view is that the decision in *Wards Cove* threatens to reinstate the traditional barriers to equal employment opportunity, the arbitrary and artificial barriers that the first witness this morning referred to, and that it would allow employers, through the choice of new tests, to raise new barriers which would be very, very difficult to overcome, even though they are clearly discriminatory, in their impact.

I noted in my testimony last year statistical evidence showing enormous disparities in performance on standardized tests between whites, on the one hand, and blacks and other minorities on the other. These are typically called intelligence tests, or something of that kind. The disparities are so enormous that any employer seeking to preserve or arrive at a predominantly white work force could easily select one of these intelligence devices and substantially screen out blacks at a hugely disproportionate rate, Hispanics and American Indians, as well.

There is a much smaller disparity between men and women on these tests, but that disparity is statistically significant. The huge disparity in tests for women have to do with physical performance of different kinds, and that was illustrated by the test for a firefighter that was discussed by the first witness this morning.

Last year the thrust of my testimony was to why we needed a bill. I think that has been discussed. I think there is clearly a need for the bill. Judge Posner of the Southern Circuit, who is generally viewed as a very conservative judge but one who writes clearly and articulately, stated that there are two problems with *Wards Cove*.

One is that it returns the burden of persuasion to the employee or applicant for employment rather than keeping it on the employer, who is the one who chose the test or the other selection procedure in the first place, and therefore should be able to defend it.

Secondly, Judge Posner said, it dilutes the "necessity" in the business necessity defense. It so dilutes it that Judge Posner later described the burden of the employer as simply showing that his decision was reasonable. There are a host of reasonable-sounding devices that are in fact notable only by their discriminatory result rather than any improvement in job performance.

So I think that we need a bill. I think it is essential. I agree with Mr. Kimerling that every day that goes by without a bill is a day when equal employment opportunities are being defeated, and many times those opportunities cannot be recaptured.

The major subject of disagreement, as I see it now, is the standard of the law. Some of the opponents of last year's bill have recognized what seems to be an unarguable proposition that the employer ought to have the burden, because the employer is the one who chose the procedure, the employer is the one who should have conducted a study to determine what selection procedures would properly measure a person for the job.

So I think the argument about where the burden of persuasion should lie is essentially over. The major problem is, what should the standard be? What is "business necessity," or what is "demonstrable relationship to successful job performance?"

I have put on page 6 of my testimony quotes from *Griggs*, and in that half-page footnote, footnote 7, you can see several different phrases. I was not aware when I did that that the staff was going to do the same thing, essentially, in the left-hand column of this large sheet that I think you all have.

Mr. Chief Justice Burger was writing an opinion for the Court, and he used some terms interchangeably. I have to associate myself with the remarks of Mr. Kimerling that a lawyer arguing a case of this kind will have read the whole case and the Court will have read the whole case, and you get a thrust or understanding of it. It is true that the Court used "manifest relationship," but also used "demonstrable relationship to successful performance," also "measure a demonstrable relationship to successful performance," "related to job performance," and so forth.

The notion was, however, that the employer must show that there is actually a benefit, in terms of job performance, from the test in order to justify a test that has an exclusionary effect. That is, I think, the essence of what we should capture.

I think that it is notable that during the 18 years in which *Griggs* was the law of the land, unarguably, there was no evidence of widespread use of quotas because of *Griggs*, and that was true after *Albemarle* and *Dothard* and the other Supreme Court decisions, as well.

On the other hand, I think most people in the field would acknowledge that the tests that were developed in the 18 years in which *Griggs* was the law were better tests, not simply because they had somewhat less adverse impact, which some of them did, but also because they were better predictors of successful job performance.

I think the language of H.R. 1 is good and workable. I particularly endorse the provision in Section 3 which says the purpose is to restore the law or to codify *Griggs* and to overturn *Wards Cove*. That is not usual legislative language, I recognize. I think it is terribly important to get over some of the hurdles that we have when you argue about one phrase rather than another. If you give that central message to the courts, the courts will understand it.

Therefore, whatever language you propose, I urge you to put that in. I don't know whether the APA is willing to endorse that. I understand their purpose is to restore *Griggs* and to overturn *Wards Cove*. If they are, I would urge them to accept that language in addition to the language that they are proposing today.

Let me turn to their proposal, because, as I say, I think that their proposal is an important one, and I think it provides a foundation for a very good definition of business necessity. Let me divert, though, and talk about two kinds of validity. I had hoped my colleague here would have done that, but let me just do it briefly.

There are two widely used kinds of ways to show validity: one is called a criterion-related validity study, and the other is called a content-related study. The classic way of showing validity was to do statistical comparisons between how persons perform on a test with how they perform on one or more criteria of successful job performance. That is the criterion-related kind of validity study. That was the one that was most widely used and that most psychologists spent most of their time on, historically.

It is probably, at least in my mind, better evidence of validity because it is empirical, and it can be analyzed, and other people can look at the data. It frequently costs more than a content validity study, but it is probably more widely usable and more persuasive evidence of validity.

The second widely-used kind is called content validity. That is simply taking an aspect of the content of the job and trying to replicate it or duplicate it in the test. The easiest kind of content validity test to conceive of is a driving test for a taxicab driver or a truck driver. You get behind the wheel, and you drive the vehicle. And if you can drive and not bump into too many things, and so forth, then presumably you can drive.

The example that is most commonly used of content validity in the books is a typing test. That is another one that is trying to replicate a skill rather than the actual content of a job, but that, too, is a traditional kind of thing.

The problem with content validity is that is has been widely abused, particularly since Title VII, with people trying to justify tests of the kind that Ms. Berkman described this morning on the grounds of content validity. It is hard to know whether you have something that is valid or not, because you sometimes wind up, unfortunately, in a swearing match—that is, not exactly a swearing match—in sworn testimony in which one expert takes one point of view, and the other expert takes a different point of view.

However, it is, for some kinds of tests, a perfectly recognized and acceptable form of validity. My reading of the proposal of the APA is to try to make it clear that content validity is a viable option under the Act. That is the reason for the third prong.

If you look at my testimony, on page 8, I quoted the APA's statement last year of their proposal, and it is substantially the same, I believe; it is a little bit reordered. If you look at (1) there, you will see the classic, I would say, classic definition of how you show validity through a criterion-related way that is almost a verbatim quote from the *Albemarle* case, the Supreme Court case which I do quote on page 6.

If you compare the language on page 6 with that first thing under (1) on page 8, you will see that it is almost exactly the same. I have no quarrel with that. I think that is the classic definition of how you show criterion-related validity.

The other part of the APA proposal that I think is worthy of consideration is what was, on my page 8, (3), "otherwise manifestly and demonstrably job related." I think that some kind of catchall is necessary in order to account for the relatively few kinds of standards where no study is required.

I give in my testimony the example of the convicted embezzler seeking to become a bank teller. You don't need a psychologist to say that that is probably a job-related matter. You have somebody who has a history of dishonesty, that is a manifest reason for not hiring the person, and it is a job-related reason.

However, that category should be a relatively small one, and that is why I thought the placing of it as third is more appropriate than the placing of it as first. In any event, wherever it is placed, I think the concept is one that is quite useful.

Note that "manifestly," by itself, doesn't do the trick for reasons that Mr. Kimerling stated. "Manifest" means apparent, and we want something that is demonstrable. That was the whole message of *Griggs*, and *Griggs* used "demonstrable." *Griggs* said that there were protestations that this was going to help the work force, but there wasn't evidence of it, and you need evidence. Evidence is some kind of study, for most of kinds of tests and for most kinds of things; not all. There is the small category that is encompassed by (3) quite appropriately.

I have a problem with subpart (2) as it was proposed last year. My problem focuses on the words "components of the job." I have heard the words "work behavior," and that is, I believe, the phrase that is used in the uniform guidelines. Normally, what you try to replicate in the test is a work behavior of the job. If the job is to drive a truck, you try to replicate that aspect of work behavior. It is usually not the only one. You may have to load and unload; you may have to do some other things too.

Nowadays, relatively few people spend all their time typing, so typing, which may be a necessary prerequisite to the job, is nevertheless usually not the whole job; it is a behavior of the job or a skill, if you will.

I have a problem with "component"; I don't know what it means, and I am afraid it is too broad. I am afraid it is too broad and therefore might include a number of things that do not truly restore us to *Griggs*. I have tried my own hand at language on page

12. It is something that I would suggest we can do. It is page 12 at the bottom of the page.

I have tried to combine content validity and criterion-related validity, so it says "predictive or significantly correlated with or representative of important work behavior(s) of the job or job family for which the procedure is in use," and I keep, from the APA proposal, "otherwise manifestly and demonstrably job related."

Now, that is one proposal. H.R. 1 has another one, which I think in fact does not give rise to quotas, but let me talk about something that is your field, not mine. Many of the fellows of the APA work for large corporations. They are the personnel people or they are advisors to the personnel people. I think that if this committee can work out some language that the APA can endorse, something working from their text, it is going to be much more difficult for the opponents of this bill to have any legitimate cry of quota.

I understand the cries of quota do not have to be legitimate. Many of them were not in the past, but there was some nugget, perhaps, or some language there that gave the opponents an opportunity. I think, if we can work with the APA, and I include the society as well, I think that we can present a bill in which there is almost no legitimate basis for the quota cry.

I don't pretend that my proposal is necessarily superior. I have just tried to take what they had and work with it. In any event, I urge you to consider the language. I think that that one provision was the rallying cry for opposition last year.

If you can draw the teeth of that provision—and I urge you to keep the language that says the bill is intended to restore *Griggs* and overturn *Wards Cove*—if we are working within that framework, we are not trying to get more than what we had, but we are not going to accept a lot less, then I think that you should be able to propose a bill that there can be a consensus behind and therefore one that has a chance of passing.

I thank you for your time. I hope that you will have questions for me when you finish with the other members of the panel.

[The prepared statement of David Rose follows:]

TESTIMONY OF DAVID L. ROSE
BEFORE THE COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATITIVES
ON
H.R. 1, THE CIVIL RIGHTS ACT OF 1991

MARCH 5, 1991

My name is David L. Rose. 1/

Mr. Chairman and members of the Committee. I wish to thank you for the opportunity to present my views on H.R. 1, the proposed Civil Rights Act of 1991. The issues presented by this Bill, and any similar measure which may be proposed by this Committee, are of great importance to me, since I spent more than twenty years of my career with the Department of Justice in the Civil Rights Division, and spent most of that time working to enforce Title VII of the Civil Rights Act of 1964, and other

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1/ Attorney Law, 1121 12th St., N.W., Washington, DC 20005-4632. Mr. Rose was Chief of the Employment Section, and its successors, from October 1969, until he left the Department of Justice on December 1, 1987. From 1972 through 1980, ee was the staff representative of the Justice Department, and chairman of the interagency staff committee which developed the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607, which were adopted by the Departments of Justice, Labor, and Treasury and the Civil Service Commission and the Equal Employement Opportunity Commission and the questions and answers interpreting them. The Uniform Guidelines have remained in force since their adoption in 1978. Mr. Rose testified in the hearings last year, and his background is described in his prepared statement of February 27, 1990. See, Hearings on H.R. 4000, the Civil Rights Act of 1990, Vol 1, pp. 690-712, at 695.

provisions of federal law prohibiting discriminatory employment practices, and providing for equal employment opportunities. In the three years since I left the Department of Justice, in my private practice of law, I represent plaintiffs in some equal employment opportunity cases, but today I am not representing the views of any client, but am offering my views to you, based upon my experience and the information available to me.

I strongly endorse the purpose and major features of H.R. 1, and believe that legislation of this kind is essential to restore the equal opportunity laws of this Country to what they were before the five decisions of the Supreme Court in the term ending in the summer of 1989. While the other provisions of the Act are important and useful, I will direct the bulk of my prepared remarks to the problems raised by the decision of the Supreme Court in *Wards Cove Packing Co.* v. *Atonio* [2], and to ways in which those problems can be resolved by the Congress, without causing a host of new problems. In my view that decision is potentially the most damaging of the five to the rights and opportunities of blacks, hispanics, american indians and women.

I particularly welcome this Committee's decision to invite the views of the American Psychological Association and the Society for Industrial and Organizational Psychology on the best method to restore the disparate impact branch of federal equal employment opportunity law to what it was prior to the decisiion in *Wards Cove*. The professional standards of the field of industrial psychology were largely incorporated into federal equal employment opportunity law by the decision in *Griggs* and the cases which followed it, and the collective learning and experience of the industrial psycologists in the field of the validity of tests and other selection standards and procedures should provide this Committee with information which is higly valuable in evaluating the differing proposals as to how the law should be restored.

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[2] 490 U.S. , 109 S.Ct. 2115 (June 5, 1989).

As the members of this Committee probably recall, in *Griggs v. Duke Power Co.*, the Supreme Court ruled that in Title VII Congress sought to prohibit not only purposefully discriminatory practices, but also the use of "artificial, arbitrary and unecessary barriers" which are discriminatory in effect and are "unrelated to measuring job performance." [3] The Supreme Court adhered to that ruling and applied it repeatedly over the years to hold unlawful practices which, while neutral on their face, and had a severe discriminatory impact against blacks and other minorities and against women. [4] The decision in *Wards Cove* threatens to reinstate some of those traditional barriers to equal employment opportunity, and to encourage or permit employers, whether purposefully or through inadvertance, to continue or reinstate some of the traditional barriers, and to institute new selection procedures which are artificial and unnecessary bariers to equal opportunity, with devasting effect upon minorities and women.

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[3] 401 U.S. 424, 432.

[4] See, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Dothard* v. *Rawlinson*, 433 U.S. 3321 (1977); and *Connecticut* v. *Teal*, 457 U.S. 440 (1982). See also, *New York Transit Authority* v. *Beazer*, 440 U.S. 568 (1979); and *Watson* v. *Fort Worth Bank & Trust Co.*, 487 U.S. 977, 108 S.Ct. 2777 (1988).

My testimony last year was devoted primarily to showing the importance, and potentially devastating effects of the decision in Wards Cove, particularly because of the enormous dispartities between whites and blacks, hispanics and american indians on most written "aptitude" tests, the less dramatic but highly significant differences between men and women on such tests, and the dramatic differences between men and women not only in such standards as height and weight, but also in most measures of physical performance. 5/ Those disparities in test performance still exist, and still have their potentially devastating consequences, yet common experience shows that these differences in test performance are not usually matched by similar differences in job performance. Accordingly, it is my view that the most urgent business before this Committee is the prompt restoration of the law to what it was under the Supreme Court's decision in Griggs and the cases which followed it, before the decision in Wards Cove.

While there was much debate about the proposed Civil Rights Act of 1990, and particularly the provisions intended to overturn Wards Cove, there appears to be some areas of consensus. In the first place, most of the commentators agree with Judge Posner of

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5/ See Hearings, pp. 690-692, 697-701, and authorities cited.

the Seventh Circuit 6/, that the Wards Cove decision "returns the burden of persuasion to the employee" or applicant rather than keeping it on the employer, and "dilutes the 'necessity' in the business necessity defense."

Secondly, many opponents of the 1990 Bill agree that, if the employer decides to use a test or other selection procedure which has a discriminatory impact, the employer should be willing and able to defend that decision, and to persuade the court that he as a sound business basis for using the procedure. Thus, as I understand it, the Administration and many of the other opponents of the 1990 Bill, have stated their agreement to a law which would restore the burden of persuasion to the employer, as it was prior to the decision in Wards Cove.

The major subject of disagreement on this branch of the proposed legislation, therefore, is the standard that the law should prescribe in determining whether or not a test or other selection procedure is lawful. In Griggs, Chief Justice Burger, speaking for a unanimous Court, ruled that the key term in assessing whether a test or standard that has a discriminatory impact is lawful, is "business necessity." In the decision in Griggs, the Supreme Court used that term almost interchangeably with the phrases "related to job performance", "demonstrable relationship to successful performance of the jobs for which it is being used", "measuring job capability", and "manifestly

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6/ Allen v. Siedman, 881 F.2d 375, 377 (7th Cir. 1989).

related to job performance." 7/ A few years later, the Supreme Court in Albemarle Paper Co. v. Moody, gave further definition to the Griggs standard by describing the burden placed upon the employer to justify a test which is discriminatory in effect in the following language: 8/

> The message of these Guidelines is the same as that of Griggs--that discriminatory tests are impermissable unless shown, by professionally acceptable methods, to be "predictive or significantly related with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

The Court in Albemarle ruled that the district court had erred

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7/ Griggs, 401 U.S. at 430-432:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in practice. The touchstone is business necessity. If the practice fwhich operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> On the record before us, neither the high school education requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted without a meaningful study of their relationship to job-performance ability.
>
> We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built in headwinds for minority groups and are unrelated to measuring job capability.
>
> But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed upon the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

8/ 422 U.S. at 431.

"in concluding that Albemarle had proved the job relatedness of its testing program." And in Dothard v. Rawlinson, the Court noted, albeit in a footnote, that "a discriminatory employment practice must be shown to be necessary to safe and effecient job performance to survive a Title VII challenge." 9/ Thus, there are many phrases which arguably recapture the Griggs standard, rather than only a few.

Much progress was made during the 18 years in which the Griggs decision was unarguably the law of the land. Many employers conducted the kind of self-examination of traditional selection procedures contemplated by Title VII, and rid their businesses, and the applicants and employees affected, of practices which were discriminatory in impact and not related to successful job performance. Not only were employers obliged to examine their selection practices in light of their possibly discriminatory impact, but also in light of their validity, that is, whether they actually do predict or lead to successful job performance.

Most industrial psychologists and many employers will, I believe, acknowledge that the whole process resulted in improved selection procedures, that is, use of tests and other practices that better predicted successful job performance. And I believe that most employers will acknowledge that the Griggs decision did not lead to the imposition of quotas.

How can this Committee and the Congress restore the Griggs

9/ 433 U.S. at 331-332, fn. 4.

standard ? One way is of course that offered by H.R. 1 as now drafted. I believe that the language of Section 3(o)(3) of the Bill is particularly appropriate in making clear the intent to restore Griggs, and not impose a new, more stringent standard. While I believe that the proposed language in Sections 3 and 4 would in fact restore the standards of Griggs, I recognize that the language of Section 3 (o)(1) has been broadly attacked as going beyond Griggs.

The testimony and proposals of the American Psychological Association and the Society of Organizational and Industrial Psychologist this morning should, in my view, be of assistance in drafting an alternative provision that restores the stndard of the Griggs case, without raising again this year the storm of controversy that surrounded Sections 3 and 4 of last year's bills. My understanding of their proposal, which is based upon their letters of September 9 and 13, 1990, is that "business necessity" be defined (in Section 3(o) of the Bill) as follows:

> The term "required for business necessity" means shown to be (1) predictive of or significantly correlated with work behavior(s) comprising or relevant to the job or job family for which the procedure or procedure is in use, or (2) representative of one or more important components of the job, or (3) otherwise manifestly and demonstrably job related.

In my judgment, the proposed definition is one which provides the basis for further discussion, and which may lead to a concise way to recapture the Griggs standard. However, I have a substantial problem with part (2) of the formulation as written, because I believe it gives too much license to the use of tests based upon the theory of "content validity."

If you will bear with me for a moment, I will try to explain my position and the reasons for it. Most tests are shown to be valid (or to lack validity) by studies based upon two theories or methods of validity. [10] Criterion related validity is shown through one or more studies showing that performance on the test is positively and significantly related to aspects or measures (that is, criteria) of successful job performance. This kind of study requires the formulation of a criterion or criteria of successful job performance, and thereafter a statistical comparison of the results on the test with results of the same persons on measures (criteria) of successful job performance. While criterion related studies are more elaborate than content studies, and are likely to cost more, they were traditionally viewed as more reliable, because they are based upon objective, empirical evidence. Thus, if persons who do well on tests make more or better widgets, or sell more life insurance, than persons who do poorly on tests, and the results are statistically and practically significant, then the test is said to be valid, as shown by a criterion-related validity study.

The second commonly used method of determining validity is the "content validity" approach. Under that method or theory of validity, the content of the test is matched against the content important aspects of job behavior; and if the test is itself a representative sample of the content of the job, it is valid. in addition, if the test is a good measure of knowledges or skills or abilities may be valid, if the selection procedure can be operationally defined, and if the tested skill, ability or knowledge is itself a necessary prerequisite to successful job performance. 11/ A driving test for a truck driver or a cab driver is an example of the kind of test which may be a representative sample of the job, and therefore may be content valid. A test of typing or a foreign language might be a test of a skill or knowledge which is a prerequisite to successful job performance. While content validity studies are relatively inexpensive, they are frequently not appropriate for use in many jobs for which the contents are not easily sampled, and which do not have prerequisite job knowledges. Moreover, the higher the level of the job, the less likely a test is to be appropriate for most content validity studies. Yet because the content validity approach is relatively inexpensive, and depends in large part upon the expert's endorsement, its use has grown dramatically in recent years, particularly in defense of employer's tests in challenges under Title VII. My experience with in the Department of Justice led me to conclude that the content validity approach was the most used, and abused, method for defending discriminatory tests. The broad definition of content validity

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[10] A third basis for showing validity, "construct validity", is much less commonly used; and itself is based upon a series of research studies, including criterion related validity studies. See, Sec. 14 D, Uniform Guidelines on Employment Selection Procedures, 29 C.F.R. 1607.14D.

11/ See, Section 14C, Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. 1607.14C.

would therefore lead to sustaining many tests that are discriminatory in fact and have little value in predicting job performance.

Let me return to the proposal of the APA and The Society. First, the parts I believe appropriate. Part (1) is a paraphrase, which is close to a verbatim quotation from the decision of the Supreme Court in Albemarle. Compare, the quotation from the proposal, p. 8 above, with the quotation from the Supreme Court's opinion in Albemarle, p. 6 above. That quotation was an excellent summary of the law on the showing of criterion related validity, and in my view is an excellent statment of what the Griggs standard is for showing such validity. Accordingly, I have no quarrel with it, but endorse it.

The second feature of the APA/Society proposal I find helpful is clause (3), "otherwise manifestly and demonstrably job related." That phrase is necessary because there are a few selection procedures or standards that cannot by their nature be the object of a formal validity study. Thus, a bank or other financial institution may appropriately consider an embezzlement conviction, or a pattern of dishonest behavior, as a disqualifying factor in an applicant for a bank teller position, or for a position which required the handling of money. Simlarly, dependency upon a drug may be a legitimate basis for disqualifying persons who seek to drive buses or subway trains, without the need for a validity study. [12] In my view, the proposal properly sets a high standard, by requiring both that the selection procedure be both "manifestly and demonstrably" job related, yet the proposal realistically recognizes that not all selection standards require validation to be lawful under Title VII.

My major concern with the proposal of the industrial psychology organizations is with (2) of their definition. As I understand the proposal, it is intended to make it clear that the content validity approach is a legitimate one. Yet the word component is in my view so vague and broad as to threaten that standard in (2) will supercede and render superfluous the standards in (1) and (3). I am not familiar with the term "component" as used in the proposal, and do not know of any body of expert knowledge to which it pertains. My suggestion would be to use the words "work behaviors" in place of the word component. As noted, "work behaviors" was used by the Supreme Court in Albemarle, and is indeed used by the APA and the Society in their proposal. My suggestion would be to use "work behaviors" in place of "component", and modify the proposal to read as follows:

> The term "required for business necessity" means shown to be (1) predictive of, significantly correlated with or representative of important work behavior(s) of the job or job family for which the procedure or procedure is in use; or (2) otherwise manifestly and demonstrably job related.

I would in addition urge that the present language of

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[12] See, new York Transit Authority v. Beazer, supra.

Section 3 (o)(3) be retained, to render unmistakable the intent of this Committee and the Congress that the purpose of Section 3 and 4 is to restore and preserve Griggs and to overrule the treatment of business necessity defense in Wards Cove. Together, the two provisions would restore the law to what it was before Wards Cove, and do so in a manner which would be in accord with the standards of the psychological profession and would be highly defensible.

I would be glad to respond to any questions.

Chairman FORD. Thank you very much.

Mr. Dichter.

Mr. DICHTER. Thank you, Mr. Chairman. It is a great honor to appear before you and the members of this committee.

I am a partner in the law firm of Morgan, Lewis & Bockius, in our Philadelphia office. For over the last 21 years, I have been engaged in the practice of labor and employment law, and, in particular, the counseling and representation of employers with respect to employment discrimination matters. I have actually tried a number of cases involving the disparate impact theory under Title VII.

I served as the management co-chair of the Equal Employment Opportunity Law Committee of the American Bar Association for three years, from 1986 to 1989. I served as the editor-in-chief of the supplements to one of the leading treatises on employment discrimination law, the Schlei & Grossman treatise, which is published by the American Bar Association and the Bureau of National Affairs.

The views I will express here today are my own, not necessarily those of my law firm or our clients, the Bar Association, or any other entity. I will take a few minutes to summarize my written testimony, which I would respectfully request be included in the record.

Considering legislation to codify into Title VII the disparate impact theory, it is important to consider the creation of that theory, the development and the application of that theory over the years. As we know, that theory is not expressly included in Title VII as it was passed in 1964 or as it was amended. It was first articulated by the Supreme Court in the *Griggs* case.

In my view, the *Wards Cove* decision does not constitute the demise of the disparate impact theory, as some have suggested, nor does it even necessarily represent a dramatic change in the law. It is a continuation of the development and application of the disparate impact theory.

As that theory was originally developed and applied over the years, in the vast majority of cases, it was applied to situations where there was a clearly identifiable employment practice being challenged which was otherwise neutral on its face. Most of the cases involved primarily skilled or semi-skilled positions.

What the Supreme Court did do in *Wards Cove* and its earlier decision in *Watson* was to expand the application of the disparate impact theory beyond clearly identifiable objective employment criteria to subjective employment criteria, which are not necessarily so clearly defined. As it did so, the focus on the language and the burdens which would arise as a result of a finding of disparate impact became more critical to examine.

I don't think there is any question that all of us here are committed to the goal of Title VII of eliminating discrimination in employment, and all of us have worked very hard over the years towards that goal. I think we also should be, if we are not, sensitive to not creating a system which forces employers or even encourages employers to focus on hiring by the numbers and discourages efforts to hire, promote, compensate, and retain the most qualified employees, best able to serve the employer's legitimate business interests.

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I think we also, perhaps contrary to the interests of some of us at this panel, are not necessarily in favor of encouraging a system which would require every employee of an employer, who is making an employment decision, to have sitting at his or her arm an industrial psychologist and an employment attorney to guide them in making every one of the employment decisions they need to make on an ongoing basis.

There are three aspects of H.R. 1 that I particularly want to address: one has to do with the ability to challenge a group of employment practices rather than an individual practice. The second has to do with what the standard should be of the burden of showing the relationship, the job-relatedness, of the employment practice being challenged and the job or jobs in question.

And, thirdly, the third prong, that even if the employer meets the burden of showing that the requirement was justified by business necessity, under H.R. 1, if the plaintiff demonstrates that a different practice would have a lesser disparate impact, would serve the employer as well, the practice would be found unlawful.

It is somewhat ironic that these hearings are being held before a committee called the Education and Labor Committee. If we go back and look at the *Griggs* case, it really sent two messages: one message to employers that even though you might not have intentional discrimination, even if you adopted a practice without any improper motive, but if that practice had a significant disparate impact, then there was a need to show that it was job related.

But there is also another message of *Griggs*, which I think is somewhat of an unfortunate message. When you look back at *Griggs*, keep in mind that one of the requirements being challenged was the high school degree requirement for unskilled jobs. And the message that one might read from *Griggs* was that high school degrees are not important in the work force.

Perhaps we might also continue to focus—and one would have hoped that by today that part of the *Griggs* case would not have arisen, that there wouldn't be a disparate impact arising between minorities and whites on the attainment of high school degrees. Perhaps if we had more stress on the education element of the efforts here, we wouldn't have that aspect of disparate impact to deal with.

Focusing now on the specific employment aspects of *Griggs* and the following cases, it is again important to keep in mind that we are talking about, in the disparate impact theory, not intentional employment discrimination; in many cases, policies adopted in good faith by employers to select the best employees for their job, best able, in a most efficient selection process.

Griggs created this new approach of looking at disparate impact where we moved away from looking at motive and looked at the effect that certain practices would have. As we look at those practices, I think it is important, in applying or attempting to draft language, that we think about the great variety of practices we are talking about, not merely the unskilled jobs that we talked about in *Griggs*, not just the firefighter jobs that we heard discussed earlier today, but a similar approach, or rather the same language applying to higher level jobs: high-level policymakers, managers, scientists, professionals; the justification for a college degree in many employment decisions, or even excellent academic performance, or any of those kinds of experiences.

Each of us needs to think about where we have been involved in the employment process, whether it is your hiring members of your staff, clerical or professional members of your staff, or anyone involved in the employment process. When you look at the words, think about how those words would apply to you in attempting to justify the interview, the questions you ask, the criteria, and other aspects that you utilize to make employment decisions.

We are not just talking about large, sophisticated employers that have full-time industrial psychologists working for them. We are talking about a wide variety of employment opportunities, a wide variety of employers, and a wide variety of employment decisions, which, in codifying this language, we would be applying it to.

What has occurred over the years since *Griggs*, and I think as the testimony of the first witness demonstrated worked well in her example, was that the courts have developed and continue to refine this principle, and they have applied it on a case-by-case basis. As they had other kinds of jobs to apply it to, they needed to refine the language in each of those cases.

As they moved into subjective criteria, additional language was needed to refine the standards to be utilized. It is important to keep that in mind, if we attempt to now codify in a few sentences, what, as Dave Rose pointed out, the courts have for years struggled with various phrases in dealing with.

One of the aspects of this particular bill which we have not talked about so far today in great detail has to do with the ability to challenge a group of employment practices, instead of, as in all of the examples we have seen, including the testimony of the first witness, a specific employment practice.

In the challenge to the hiring of women firefighters, the challenge focused on specific elements of the test, not the overall practice, not the written exam, not even necessarily all elements of the physical exam, but specific elements of the test which were shown to have the disparate impact, and the focus then was on the attempt to justify those.

Under the language of H.R. 1 and the ability of a plaintiff to challenge a group of employment practices, we begin to blur, if not eliminate, the distinction between the disparate treatment theory and the disparate impact theory.

If the challenge can be to a group of employment practices, then cases like *Teamsters* and *Fernco* could have been fought on that basis, without any need of finding intentional discrimination, merely by a plaintiff showing a disparity between the employer's work force and the qualified available work force, without pointing to anything in the employment process which may have caused that, and thereby forcing the employer to validate the entire process.

Keep in mind, while most of the discussion has been with respect to hiring cases, the language of H.R. 1 would apply equally to cases involving promotion, assignments, compensation, and layoffs, how employers make the decision in contracting their work force, in deciding who to promote to higher-level positions.

One of the most troubling aspects of H.R. 1 has to do with the third prong; that is, the proof of alternative practices. Under H.R. 1, as drafted, if there is a disparate impact which is shown and the employer meets the burden, the burden under H.R. 1 of demonstrating that it is required by business necessity, the plaintiff then has the ability to come forward and demonstrate that there is an alternative or group of practices which has a lesser impact but could serve the employer as well.

With that proof, the employer's practice will be found per se to have been unlawful, without any requirement or any evidence that the employer was necessarily aware of that practice, aware that it had a lesser impact, or aware that it would serve as well; without any evidence of pretext; without any evidence that the employer adopted and chose one practice over another for any improper purpose or that it failed or refused to utilize this alternative practice.

That is a significant distortion of the law. It is not an issue that *Wards Cove* dealt with and one that significantly reverses the law and places, it seems to me, an impossible burden on employers to deal with.

Much of the debate has been around quotas. I don't want to continue to extend that debate to any degree other than the talk about the fact that this really is along a continuum: The harder you make it for employers to justify practices, more costly, more expensive, and require them to justify imbalances in their work force between their work force and qualified available employees, the more likely it becomes that employers seek to avoid those by simply dealing with the numbers rather than the practices. It is in that way that this kind of legislation could lead to quotas.

I think there has been some meaningful dialogue here on focusing on the language used in the standards. I think we also need to focus on the concept of grouping employment practices and use of alternative selection devices. But I caution all of you, as you go forward with that practice, that as you attempt to legislate in an area which has been, in effect, developed by the common law process over the last 19 years, you engage upon a process which, as you have seen, can become extremely difficult and have effects which you have not contemplated.

Thank you.

[The prepared statement of Mark Dichter follows:]

TESTIMONY OF
MARK S. DICHTER
MORGAN, LEWIS & BOCKIUS
PHILADELPHIA, PA
BEFORE THE
EDUCATION AND LABOR COMMITTEE
U. S. HOUSE OF REPRESENTATIVES
MARCH 5, 1991
ON
H. R. 1
THE CIVIL RIGHTS ACT OF 1991

Mr. Chairman and members of the Committee, I am Mark S. Dichter, a partner in the law firm of Morgan, Lewis & Bockius. For over 21 years I have been engaged in the practice of labor and employment law, and, in particular, the counseling and representation of employers with respect to employment discrimination matters. I have tried a number of cases involving claims of disparate impact under Title VII of the Civil Rights Act of 1964, as amended.

I served as the Management Co-Chair of the Committee on Equal Employment Opportunity Law of the American Bar Association's Section on Labor and Employment Law from 1986 to 1989. I have also been the editor-in-chief of the supplements to Schlei & Grossman, Employment Discrimination Law, the leading treatise in the field of employment discrimination law, published by the American Bar Association and the Bureau of National Affairs.

I greatly appreciate this opportunity to appear before you and testify on H.R. 1, The Civil Rights Act of 1991.[1] The views I will express here today are my own and not necessarily those of Morgan, Lewis & Bockius, any of our clients, the American Bar Association, or any other entity.

I will primarily direct my comments to Section 4 and the related definitional provisions of H.R. 1 which purport to be "restoring the burden of proof in disparate impact cases" and to overrule the holding of *Wards Cove Packing Co., Inc. v. Atonio*[2]. In particular, I will focus upon the departure that H.R. 1 makes from the existing state of disparate impact law as embodied in *Griggs v. Duke Power Co.*[3] and its progeny, and second, I will briefly discuss the effect, or lack thereof, that *Wards Cove* has had on lower courts' analyses in Title VII disparate impact cases.

In *Wards Cove*, the Supreme Court held that in disparate impact cases: (1) a plaintiff must identify the *specific* personnel practice being challenged and must show it to have a causal link to the demonstrated disparate impact; (2) in making out a *prima facie* disparate impact case, the proper statistical comparison is generally between the racial composition of the at-issue job and the racial composition of the qualified population in the relevant labor market; alternatively, if such general labor statistics are unavailable, other statistics, such as those comparing persons holding at-issue jobs to the otherwise-qualified applicant pool are acceptable;[4] (3) a plaintiff bears the ultimate burden of persuasion at each stage of the disparate impact case and only the burden of production of evidence shifts to the employer upon a plaintiff's proof of a prima facie case of disparate impact; (4) the employer's burden of production is to show that the challenged practice "serves, in a significant way, legitimate goals of the employer"; and (5) a plaintiff may be able to defeat the business justification defense by showing that a less exclusionary practice would serve the employer's legitimate interests as well; a plaintiff's suggested alternative must be "equally effective as the employer's procedures in achieving legitimate business goals." If the employer refuses to adopt the alternative, such a refusal would establish that the challenged practice was a pretext for discrimination.

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[1] H.R. 1, 102nd Cong., 1st Sess. (1991).

[2] 109 S. Ct. 2115 (1989).

[3] 401 U.S. 424 (1971).

H.R. 1 purports to restore the burden of proof in disparate impact cases to what the proponents claim was the law

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[4] Wards Cove merely reaffirmed prior law with respect to statistical evidence and H.R. 1 does not appear to depart from its holding. The bill provides:

> The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation. Sec. 4.

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prior to Wards Cove. The bill goes much further, however. The bill makes at least the following six changes to existing law as defined by Griggs and its progeny, not only Wards Cove:

1. In order to make out a prima facie case, a plaintiff need only demonstrate a disparate impact, not a significant disparate impact;

2. A plaintiff need not point to particular selection procedures as the cause of a disparate impact, but may show that an overall group of practices was the cause;

3. By defining the term "demonstrates" to include both burdens of production and persuasion, upon a plaintiff's successful proof of a prima facie case in disparate impact cases, the burden of persuasion shifts to the employer to prove its "business necessity" defense; this could also result in shifting the burden of persuasion in disparate treatment cases;

4. An employer may only utilize objective, rather than subjective, evidence to prove its business justification;

5. An employer's burden of proof as to "business necessity" would no longer be to show "job relatedness" of an employment practice, but rather to show that the practice or group of practices "bear a significant relationship to successful performance of the job" or "to a significant business objective of the employer (in the case of employment practices that do not involve selection)";

6. A plaintiff's proof that a different employment practice or group of employment practices with less disparate impact would serve an employer as well, in response to an employer's successful proof of a business justification, would automatically make an employer liable whereas under existing law such a showing only constitutes evidence of discriminatory pretext.

1. H.R. 1 Clearly Changes Pre-*Wards Cove* Law by Only Requiring a Plaintiff to Show Disparate Impact, Rather than *Significant Disparate Impact.*

H.R. 1 requires that a plaintiff demonstrate only a disparate impact as one step in making out a *prima facie* case. Under existing law, a plaintiff does not meet his or her burden until a *significant* disparate impact is proven. *Wards Cove* did not represent a departure from existing law in requiring more than a slight showing of demographic imbalance.[5] If H.R. 1 were passed, the exclusion of the term "significant" or "substantial" could be interpreted to lower the threshold burden and would suggest that a plaintiff could make out a *prima facie* disparate impact case by merely showing that there was some imbalance between the composition of its employer's workforce and the composition of the qualified relevant labor market. This would constitute a major change in the law which bears no relation to any recent Supreme Court precedents. Even Justice Stevens, in his dissent in *Wards Cove*, recognized that the threshold question is whether the employment practice has a "significant, adverse effect."[6]

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[5] 109 S.Ct at 2115, 2125; *see also* *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

[6] 109 S. Ct. at 2131.

2. H.R. 1 Would Shift the Burden of Persuasion to the Employer Upon Proof of Disparate Impact.

Section 4 of the Civil Rights Act of 1991 also provides that if a plaintiff demonstrates that he or she has been disparately impacted due to some business practice, the employer must demonstrate that the practice was required by business necessity. The term "demonstrates" is defined in Section 3 to mean "meets the burdens of production and persuasion." By defining the word "demonstrates" to include both elements of proof, H. R. 1 proposes to reverse Wards Cove to the extent that the Supreme Court held that the burden of persuasion remained with the plaintiff throughout a case.

The shifting of the burden of proof to the defendant/employer is particularly troubling when considered together with other provisions of H.R. 1 which may lower the level of disparity required to establish a prima facie case, the elimination of the requirement that the plaintiff identify the particular practice alleged to cause the disparity, the restriction that the employer may use only objective evidence to establish business necessity, and the significantly higher standard of business necessity.

3. H.R. 1 Allows a Plaintiff to Make Out a *Prima Facie* Case by Merely Demonstrating that a Group of Employment Practices Results in a Disparate Impact Without Any Requirement to Identify the Specific Practice Alleged to Cause the Disparity.

H.R. 1 would alter existing disparate impact law, by permitting a plaintiff to show that an overall "*group* of employment practices" resulted in a disparate impact upon a protected class. The bill defines "group of employment practices" to mean "a combination of employment practices that produces one or more decisions with respect to employment . . ." The obligation to identify the practice alleged to cause the disparate impact has been a consistently applied requirement.[7]

To allow a plaintiff to point only generally to a group of practices allegedly having a disparate impact would place the focus on the "bottom line" rather than specific employment criteria or practices. However, the Supreme Court in *Connecticut v. Teal*, a pre-*Wards Cove* holding, specifically stated that the proper focus of a disparate impact analysis is *not* on a bottom-line, but rather on the effect of particular practices.[8] The

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[7] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (high school diploma requirement); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guards); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1977) (employment tests and seniority systems); *Connecticut v. Teal*, 457 U.S. 440 (1982) (written examination); *Watson v. Fort Worth Bank & Trust*, 109 S. Ct. 2777 (1988) (subjective judgment of supervisor); *Wards Cove*, 109 S. Ct. 2115, 2124 (1989) ("[o]ur disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities.")

[8] 457 U.S. at 450.

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requirement set forth in Wards Cove, that the plaintiff must identify a specific employment practice which is alleged to have caused the disparity is consistent with the vast majority of lower court cases which have focused on this issue. In other words, this bill differs significantly from Griggs and its progeny, the very law which supporters of H.R. 1 claim to be restoring.

4. H.R. 1 Would Prohibit An Employer From Proffering Subjective Evidence to Prove Business Necessity.

H.R. 1 provides that in proving business necessity, "unsubstantiated opinion and hearsay are not sufficient; demonstrable evidence is required." This language would seem to require proof of business necessity by objective evidence alone. In precluding the use of subjective evidence, H.R. 1 is inconsistent with business reality. In cases involving lower level, highly mechanistic jobs, courts probably should rely heavily upon objective evidence. However, in situations involving higher level jobs, ones which involve elements of discretion, common sense, ethics, and originality, for example, H.R. 1 will prove unworkable. In the real world, employers must rely upon subjective criteria. The Supreme Court, in Watson and Wards Cove, recognized this business reality in holding that subjective evidence was an acceptable form of proof in making out a business necessity. The Supreme Court also was well-aware that such evidence could be abused by fabrication. In recognition of this danger, the Court warned that the subjective justification may not be "insubstantial."

5. H.R. 1 Would Require Employers to Demonstrate that the Allegedly Discriminatory Practice Bear a Significant Relationship to Successful Performance of the Job at Issue to Make Out its Business Necessity Defense.

H.R. 1 again departs from *Griggs* and its progeny by requiring an employer to demonstrate that its employment practice "bears a significant relationship to successful performance of the job." *Wards Cove* held that an employer could prevail on the issue of "business necessity" by showing that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer."[9]

A review of *Griggs* and its progeny reveals that the definition of "business necessity" was not indelibly prescribed by *Griggs*. More accurately, the standard developed in the early disparate impact cases was a vague concept of job-relatedness developed in the context of specific objective selection criteria as applied to unskilled or semi-skilled jobs. The *Watson* and *Wards Cove* interpretations of "business necessity" to mean "legitimate business reason" simply represent the latest step in

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9/ 109 S. Ct. at 2125, *citing Watson*, 108 S. Ct. at 2784 (*prima facie* case, even if made, rebutted by legitimate nondiscriminatory reasons); *New York Transit Authority v. Beazer*, 440 U.S. 568, 587, n.31 (*prima facie* case rebutted by showing that practice is related to job performance.)

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the evolution of the term particularly as applied to subjective criteria and higher level positions.

In the earliest disparate impact cases, beginning with Griggs, it was not as critical to precisely define what the Court meant by business necessity because the facts of those cases did not require such precision. For example, in Griggs, a selection rule requiring a high school education or the passing of a standardized intelligence test was at issue. Similarly, in Connecticut v. Teal, the Court dealt with a written examination. In Dothard v. Rawlinson, the Court reviewed a height requirement and in New York City Transit Authority v. Beazer, the Court was confronted with a rule prohibiting employment of methadone users. In all of these situations, the Court was confronted with a relatively simple problem.

On the other hand, the Supreme Court in both Watson and Wards Cove was confronted with far more than the disparate impact of an isolated objective selection practice. In Watson, there was a highly subjective promotion practice placing a great deal of discretion in the hands of a white supervisor. Similarly, in Wards Cove, no objective test or rule was at stake, but rather, the disparate impact analysis was directed at an entire cadre of objective requirements which were supplemented by a subjective decision-making element.

The Court realized, however, that to simply stop at holding subjective employment criteria to be governed by disparate impact analysis would create a conflict between the objective of eliminating non-business related practices which have a significant adverse impact on a protected group and Title VII's prohibition of imposing quotas based on statistical imbalances in an employer's workforce. Where a disparate impact claim is based on a subjective employment practice, an employer could no longer just point to a validation study or the like to show that a certain employment requirement was an accurate predictor of job performance. Such proof is generally not available or practical in support of subjective business justification. The Supreme Court in *Watson* and *Wards Cove* endeavored to more clearly define what would be required to prove a "business necessity" in such cases. In an effort to strike a balance between a prohibition against the use of subjective criteria, the Court more carefully defined the job-relatedness approach to require an employer to proffer a legitimate, nondiscriminatory business justification. Realizing that this phrase could be the subject of abuse, the Court tempered the language with the caveat that "(a) mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices."[10]

Most higher level jobs involve common sense, good judgment, originality, ambition, loyalty, and other traits which cannot be measured accurately through standardized tests.

10/ *Ward Cove*, 109 S. Ct. at 2126.

Indeed, most jobs are not solely measured by some objective criteria. The Supreme Court expressly recognized the importance of subjective valuative criteria in assessing the performance or potential of individuals as managers, supervisors, or in a capacity which requires cooperation with co-workers or an understanding of complex and subtle tasks.[11] In adopting the legitimate, nondiscriminatory reason test the Court struck a delicate balance between competing interests.

H.R. 1 could disrupt this balance. For example, if the inclusion of the word "significant" to describe the relationship that an employment practice must have to job performance refers to statistical significance, the effect of H.R. 1 would be to dramatically distort Griggs. Existing law does not seek to quantify the relatedness of the employment practice to the job; rather, only a qualitative legitimacy must be shown. Moreover, the phrase "performance of the job" presents problems. This requirement is far too limiting and unrealistic. Employers always consider such factors as absenteeism, tardiness, accident rates, and turnover in assessing the value of an employee or an applicant. H.R. 1, as written, does not account for these concerns. This more difficult burden coupled with the requirement of objective demonstrable evidence unmistakably stacks the deck against employers in their efforts to prove a business justification.

11/ Watson, 108 S. Ct. at 2787.

6. Contrary to Existing Law, H.R. 1 Creates a Per Se Rule of Employer Liability Any Time a Plaintiff Can Demonstrate a Less Discriminatory Alternative.

H.R. 1 also makes another subtle, but extremely significant, change to pre-Wards Cove law. The last sentence of Section 4(k)(1) lends the appearance of codifying existing law by providing that a plaintiff may prevail, even when an employer has demonstrated a "business necessity," by showing that a less discriminatory alternative would serve the employer as well. Although this section has the appearance of codification, it too represents a radical departure from existing law.

H.R. 1, if adopted, would create a per se rule that if a plaintiff can present evidence of a less discriminatory alternative in response to an employer's proof of business necessity, the employer will be found to have violated Title VII. This is not what existing law provides. The seminal Supreme Court precedent establishing this third prong of the disparate impact theory did not create such a per se rule. Rather, Albemarle Paper Co. v. Moody[12] and its progeny held that proof of a "less discriminatory alternative" merely provided evidence that the employment practice which the employer sought to justify was in fact a pretext for illegal discrimination. This is not, and never has been, a per se rule of employer liability. The Supreme Court made that perfectly clear:

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[12] 422 U.S. 405 (1975).

> If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship." *Such a showing would be evidence that the employer was using its tests merely as a "pretext" for discrimination.*[13]

The *Albemarle* rule has been oft-repeated, without change, by the Supreme Court. In particular, the *Beazer* court held that "the District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that [the rule] was merely a pretext for intentional discrimination."[14]

From a policy standpoint, this change which H.R. 1 attempts to implement will radically affect employers. An employer could be held to have violated Title VII for failure to adopt an alternative employment practice of which it may not have even been aware or had reason to believe was equally as effective or had a lesser impact. If the employer fails to discover some approach that may have a less discriminatory impact, the employer would be subject to Title VII liability no matter how diligent it had been in adopting its practice. When considering this language one should be mindful of the oft-stated maxim that

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[13] *Id.* (emphasis added) *quoting McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 804-05 (1973).

[14] 441 U.S. at 587.

"[c]ourts are generally less competent than employers to restructure business practices.[15]

Tinkering with the delicate balance which has evolved from Supreme Court precedents through *Watson* and *Wards Cove* in the manner that H.R. 1 does would inevitably result in the implementation of formal or informal race and gender-base quotas. Employers operate under the constraints of time and money and out of necessity, they make employment decisions based on less than fully informed predictions and in response to highly competitive pressures. Many of these considerations are qualitative; they involve perseverance, compatibility, attentiveness, originality and the like. Such considerations are very difficult, if not impossible, to measure in the same way as the objective criteria examined in the early disparate impact cases. Even if such qualitative considerations could be quantified, these measures would be difficult to apply because there is little agreement as to what constitutes successful performance of any job involving complex tasks requiring the exercise of judgment. Moreover, job responsibilities tend to be fluid over time. Jobs, markets, technology, governmental policies, and intellectual and social trends are constantly in a state of flux. Thus, what may be measure of success one day, may well be a measure of failure the next. The point is that *Watson* and *Wards Cove* took these factors into account. H.R. 1 does not. Rather, it imposes six new and

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15/ *Wards Cove*, 109 S. Ct. at 2127 (*quoting* *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

substantial burdens upon employers. This statutory rejection of twenty years of legal development and refinement is unsound and very likely will result in the implementation of unwanted quotas.

Not only are the changes made by H.R. 1 inappropriate, but they are also unwarranted. As was reported by John R. Dunne, Assistant Attorney General, to the Attorney General on February 7, 1990:

> . . . since Wards Cove courts have continued to examine carefully the business justification for challenged selection tests, teacher certification examinations, reliance on word or [sic.] mouth hiring, the allocation of too much discretion to those making hiring decisions, excessive reliance on interviews, and a residence requirement for applicants for municipal employment. And, in two cases, courts invalidated practices because comparable alternatives existed that would not produce the same disparate impact on minorities.[16]

As a review of the cases decided since Wards Cove indicates, the disparate impact theory is still alive and well. Lower courts have taken seriously the Supreme Court's caveat that "[a] mere insubstantial [business] justification . . . will not suffice."[17] Moreover, the lower courts also have continued to question whether an employer has forsaken a less discriminatory alternative in implementing the practice which it claims to be supported by a legitimate business reason. Watson and Wards Cove

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16/ Justice Department Memo on 1989 Supreme Court Civil Rights Decisions, Daily Lab. Rep. (BNA) No. 28, at D-1 (Feb. 11, 1991).

17/ Green v. USX Corp., 896 F.2d 801, 805 (3d Cir. 1990) citing Wards Cove, 109 S.Ct. at 2126.

have not made subjective, multi-component selection processes invincible as many proponents of H.R. 1 claim would occur.

Notwithstanding recent Supreme Court precedent, courts have had no trouble rejecting employers business justifications under the "legitimate business reason" standard. In NAACP v. Harrison,[18] for example, plaintiffs attacked residency requirements imposed by a municipality as a prerequisite to employment. With respect to police officer and fire fighter positions, the municipality argued that its requirement was justified on the grounds that these employees should live nearby so that they could quickly respond to emergency situations and because it wanted the uniformed personnel to be a presence and take an active role in community programs such as Scouting and Little League. The court rejected the emergency justification as unsupported in fact.[19] The court also rejected the community presence justification as being "insubstantial." Similarly, the court rejected the municipality's justification for its residency requirement with respect to non-uniformed personnel. The proffered justification was that residents tend to be more loyal, less likely to be late or absent and more willing to participate in local activities. These justifications were deemed illegitimate because they were "too nebulous and insubstantial to justify practices which have had a significant discriminatory effect...."[20]

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[18] 749 F. Supp. 1327 (D.N.J. 1990).

[19] Moreover, the court concluded that there was a reasonable and less discriminatory alternative of imposing a rule requiring uniformed personnel to live within a reasonable time or distance.

In Richardson v. Lamar County Board of Education,[21] the court also rejected an employer's proffered business justification for a selection practice having a disparate impact upon blacks. The plaintiff in Richardson challenged a Board of Education requirement that she pass a teacher certification test. After meeting her burden of proving disparate impact, the Board of Education produced a great deal of evidence demonstrating the process by which the test had been developed and that the certification test was designed to measure whether a teacher possessed enough minimum content knowledge to be competent to teach in the classrooms of Alabama. The court, rather than simply accepting the validity of the test, scrutinized the entire process used in formulating the test questions and found that it was flawed in a way that violated the minimum requirements for professional test development. The court, therefore, rejected the business justification proffered by the school board and entered a verdict in favor of the plaintiff.

Notwithstanding the assertions that under the Watson and Wards Cove decisions, employers would be able to avoid a disparate impact claim simply by adding subjective elements to their hiring practices, courts have continued to critically

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20/ 749 F. Supp. at 1342.

21/ 729 F. Supp. 806 (M.D. Ala. 1989).

examine such practices. In Green v. USX Corp.,[22] for example, the Third Circuit Court of Appeals rejected an employer's proffered reasons in support of a multi-component hiring system which included a subjective interview. Plaintiffs proved that the process had a significant disparate impact on blacks. The employer produced evidence that the subjective criteria enabled it to identify the "best qualified" applicants. The court found that the employer had failed to meet its burden of producing evidence of a legitimate business reason. In so holding, the court stated:

> Although Wards Cove may have relaxed the employer's burden to rebut the plaintiff's *prima facie* case, we do not read the decision as requiring us to accept at face value an employer's explanations of the adverse impact of its hiring practices on blacks. As the Wards Cove Court stated, "[a] mere insubstantial [business] justification . . . will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.[23]

Other courts also have closely scrutinized the justifications presented in support of subjective evaluative criteria which have had a disparate impact on the composition of a workforce. In Sledge v. J.P. Stevens & Co.,[24] for example, plaintiffs successfully challenged the discriminatory impact of an employer's use of subjective evaluations to select among

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[22] 896 F.2d 801 (3d Cir. 1990).

[23] 896 F.2d at 806 (citation omitted).

[24] 52 Empl. Prac. Dec. (CCH) ¶ 39,537 (E.D. N.C. 1989).

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applicants for unskilled clerical positions. The employer presented testimony that its use of a discretionary selection procedure reflected its desire to hire the best qualified people in the work force. The court rejected this evidence as insufficient to shift the burden back to plaintiff to prove that the proffered reason was a mere pretext.

Similarly, in *Thomas v. Washington County School Bd.*,[25] the Fourth Circuit Court of Appeals held that an unsuccessful black applicant for a teaching position had been discriminated against because the school in which the plaintiff had applied for a teaching position had a practice of obtaining applicants by word-of-mouth and hiring on the basis of nepotism. The court held that, at least in the context of a predominantly white work force, whatever justifications could be proffered for the use of word-of-mouth and nepotism as hiring tools are outweighed by Title VII's goal of providing equal employment opportunity. Word-of-mouth recruiting also was rejected in *EEOC v. Andrew Corp.*[26]. In this case, the employer attempted to justify its word-of-mouth approach by stating that to do otherwise would "generate additional unnecessary applications which will only result in increased administrative costs and a higher percentage of disappointed applicants." The court found this justification to be "weak" and not adequate to meet the employer's burden of producing evidence of a legitimate business reason.

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[25] 915 F.2d 922 (4th Cir. 1990).

[26] 51 Empl. Prac. Dec. ¶ 39,364 (N.D. Ill. 1989).

Courts also continue to analyze whether an employment objective proffered by a defendant employer could be equally or better served by a less discriminatory alternative practice. For example, in Bridgeport Guardians, Inc. v. City of Bridgeport,[22] a group of black and hispanic police officers challenged a promotional examination which consisted of both a written and an oral component. The first nineteen individuals on the list of those who passed the examination were white. The first black candidate had the twentieth highest score while the highest ranking hispanic candidate was the twenty-second person on the list. The police department planned to make promotions on a solely rank-order basis which the plaintiffs proved to have a significantly disparate impact. The police department, however, met its burden of producing evidence that the test was supported by a legitimate business reason. Nonetheless, plaintiffs prevailed because they proved that a less discriminatory alternative was available. They presented evidence that the creator of the examination had recommended that rather than simply making promotions in a "strict rank-ordered fashion," the promotional decisions be based on a "banding" technique. This approach selects a range of scores whose differences are not statistically significant and then promotions are made from this range, taking into account race or ethnicity, gender, work experience, past job dependability, and other factors which the department might deem pertinent and worthy of consideration. The court found this evidence persuasive, concluding that "[b]anding results in a more valid promotional procedure and may lead to the promotion of additional minorities."[28] As such, the court entered a verdict for plaintiffs.

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[22] 735 F. Supp. 1126 (D. Conn. 1990).

As this review of cases clearly indicates, Watson and Wards Cove have not sounded the death knell for the disparate impact theory. Plaintiffs still can and do win disparate impact actions. If anything, the recent Supreme Court precedents have led lower courts to more closely scrutinize an employer's proffered justification for a discriminatory employment practice as well as to more deeply examine whether a less discriminatory alternative practice could meet an employer's business objectives.

28/ 735 F. Supp. at 1137.

Chairman **Ford**. Pamela Perry.

Professor **Perry**. My name is Pamela Perry, and I am very pleased to present my views on the Civil Rights Act of 1991. As to my qualifications, I specialize in the law of employment discrimination. I was in private practice for four years, public practice for three years, and have been an associate professor at Rutgers University School of Law since 1985. The views I express today are those developed in my scholarly research, tempered, of course, by my experience in the practice of law.

I applaud the introduction of H.R. 1. I will limit my oral remarks to two points: allowing a disparate impact challenge to a group of employment practices, as contained in Section 4(1)(b), and the definition of business necessity in Section 3(o).

Traditionally, disparate impact doctrine required that employees prove that an employer's facially neutral practice or practices resulted in disparate impact based on race, color, religion, sex, or national origin. Section 4(1)(b) of H.R. 1 clarifies that employees may succeed in their disparate impact challenge when they prove that a group of practices resulted in that disproportion, even though the employees cannot isolate which one of the employer's practices was the culprit.

That dispensation, however, is very limited. First, it requires employees to demonstrate that the proved impact is attributable to the employer, not some other innocent cause. This assurance is reinforced by Section 4(4), rejecting disparate impact challenge based on "the mere existence of a statistical imbalance in an employer's work force." Consequently, whether the employee demonstrates the disparate impact of one of the employer's practices, under subsection (a), or the group of practices, under subsection (b), the employees must prove that the employer is responsible for the disparate impact proved.

In addition, subsection (iii) of Section (b) requires the employee to demonstrate which specific practice or practices contributed to the disparate impact where the records or other information are "reasonably available." Thus, Section 4(1)(b) only excuses employees from isolating the one practice resulting in disparate impact to avoid the unduly harsh consequence of dismissing claims when they are unable, through no lack of diligence on their part, to pinpoint the impact from among the employer's practices.

I think we need to be careful with regard to subsection (a) that the requirement of isolating the cause of the impact does not require us to do a question-by-question analysis on an examination. Clearly, the Court did not find such a need to isolate the cause of the impact in *Griggs*, *Albemarle*, and *Teal*.

In any case, it seems appropriate to require employers to respond either with evidence to justify or to exonerate the exclusionary effect of its own practice or practices.

It is only when employees succeed in establishing disparate impact that the employer must respond with business necessity. The definition of business necessity in Section 3(o) of H.R. 1 restores the standard of justification first required by the Supreme Court in 1971 with the *Griggs* case. For almost two decades, courts have used the *Griggs* standard as its guide, when examining exclusionary practices, to determine if the employer's justification for continued use outweighed the exclusionary effect resulting from those practices.

In 1989, however, the Supreme Court, in *Wards Cove*, articulated a new, deferential standard of business necessity scrutiny. There the majority of the Court articulated the standard to be that the disparately impacting criterion "serves in a significant way the legitimate employment goals of the employer." Because the Court had no factual record in that case to apply the business necessity standard, that standard has been interpreted by lower courts.

Lower courts have interpreted *Wards Cove* to mark a departure from *Griggs* and its progeny. The extent of that departure is captured by the Seventh Circuit in *Allen* v. *Seidman*. There the Court remanded the business necessity issue for the lower court to determine whether employees had proved the disparately impacting practice to be unreasonable, despite evidence demonstrating that the employer was reckless, perhaps even irrational, in using the exclusionary test.

Evidence in that case established that the Defendant Federal Deposit Insurance Corporation's own consultants repeatedly criticized the test. Moreover, the necessity of the test was made suspect when the FDIC itself promoted some who failed the test and indeed abandoned the test when suit was filed.

Even more important than that evidence was the evidence—and I am going to quote directly from the opinion—that on the test there were "no set questions, no set right or wrong answers, no fixed passing grade, no instructions for weighting performance on the various parts of the exam, no fixed time limits for the individual sessions, and no evaluation of the panel members. Panel members were not required to attend each session, and, if they missed one, they graded it anyway, guided by evidence of the member or members who attended."

I am still quoting: "The test emphasized the problems of small banks and, as a result, disfavored examiners who worked in the large metropolitan areas where blacks tended to be concentrated. Furthermore, the test failed to test many of tasks that bank examiners are called upon to perform. Nor was the concept of adequate performance defined, for the testers' notes revealed that they would sometimes pass a candidate after rating him barely adequate or marginally acceptable, and sometimes fail one after noting seemingly minor, readily correctable deficiencies."

Only now am I ending my quotes from that case. If this evidence caused the well-respected Seventh Circuit to pause and remand, what evidence could employees produce to demonstrate the unreasonableness of this exclusionary criterion, one that resulted in African-Americans being excluded twice as often as Euro-Americans.

This deferential standard of scrutiny undercuts disparate impact doctrine, thereby condoning unjustified discrimination resulting from facially neutral but consequentially exclusionary work place practices. H.R. 1 succeeds in restoring a standard of scrutiny that recognizes the Nation's commitment to curtail discrimination while still respecting employers' business needs.

Section 3(o) of H.R. 1 codifies three essential features of the definition of business necessity. That standard requires courts, first, to examine both the purpose for the practice and the means to accomplish that purpose; second, to scrutinize both the purpose and means by a standard that accommodates both the perspective of the excluded employees and the perspective of the employer; and, finally, to rely on demonstrable evidence, not on substantiated opinion or belief.

These three features are essential to a definition of business necessity. It is appropriate to examine both the purpose and the means for adopting the disparately impacting practice to ensure that is sufficiently necessary and effective to justify its exclusionary effect.

Moreover, it is appropriate to require mid-level scrutiny of the necessity and effectiveness of the practice to ensure the Nation's commitment to neutral employment practices without undermining the employer's legitimate discretion to operate its business.

Finally, it is appropriate to require demonstrable evidence with a flexible definition to ensure that disparately impacting practices are, in fact, necessary and effective.

I would like to comment on Mr. Dichter's testimony. It sounds like he's suggesting a standard with one level of scrutiny for lower-level jobs, and a different, more relaxed standard of scrutiny for upper-level jobs. There has never been this dichotomy in Title VII. I would urge the committee to reject it today.

The three features that I mentioned that are essential to the definition of business necessity are incorporated into H.R. 1. By the standard in H.R. 1, an employer would be permitted to use an employment practice despite its disparate impact for the purpose of accomplishing a significant business objective, or in the case of decisions involving selection, for the purpose of predicting successful performance of the job.

Moreover, by the standard in H.R. 1, an employer would be permitted to use an employment practice despite its disparate impact when the practice is shown to bear a significant relationship to accomplishing those important purposes. Thus, the business necessity standard in H.R. 1 strikes an appropriate balance between equal employment opportunity and employers' business discretion.

That standard is fully consistent with the standard of business necessity in *Griggs*. In *Griggs* the Supreme Court required Duke Power Company to justify its discriminatory hiring criteria by showing that the criteria were adopted for a genuine business need, and by showing that the criteria had a manifest or demonstrable relationship to that need.

More illustrative than looking at the language of *Griggs*, however, is to look at how the standard was applied. In applying the standard in *Griggs* the court approved Duke Power's purpose of predicting successful job performance to be a genuine business need, but rejected the company's business necessity defense because it failed to show that the high school diploma and testing practices had a "manifest relationship" or "demonstrable relationship" to that purpose.

Indeed, examination of the evidence in that case demonstrated that incumbent employees who lack the credentials continue to make progress at the company. Thus, requiring an employer to justify its exclusionary practices by the standard in *Griggs* and by the standard proposed in H.R. 1 does not undermine merit-based hiring; it ensures it.

I'd like to make one other comment on the alternative provisions in H.R. 1. And I would like to suggest that its perfectly appropriate to require the employer to substitute a less discriminatory alternative when employees have demonstrated that alternative would serve the respondent as well.

In conclusion, I support H.R. 1 to ensure that the Nation's employment opportunities are distributed either by truly neutral, not just facially neutral standards, or by standards proved to be required by business need, not convenience.

I thank the Chair and members of the committee for allowing me this opportunity to appear. And I'm happy to answer any questions you might have.

[The prepared statement of Professor Pamela Perry follows:]

Statement of Professor Pamela L. Perry

Rutgers School of Law

Camden, New Jersey

before the

Committee on Education and Labor

United States House of Representatives

on the

Civil Rights Act of 1991

H.R. 1

March 5, 1991

I applaud the introduction of H.R. 1, the Civil Rights Act of 1991. I submit this statement to comment on the Act.

As to my qualifications, I specialize in the law of employment discrimination. I was in private practice for four years, public practice for three years and have been an Associate Professor at Rutgers University School of Law since 1985. During my time in academia, I have done scholarly research and writing on the topic of disparate impact discrimination under Title VII of the Civil Rights Act of 1964.[1]

I will limit my comments on H.R. 1 to support for Sections 3 and 4 of the Act; more particularly, those subsections describing 1) disparate impact challenge to a group of employment practices, 2) the burden of proving business necessity, 3) the definition of business necessity, and 4) lesser impacting alternatives. The views I express today are more fully developed in my scholarly research. Most particularly, "Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination under Title VII", 12 Indus. Rel. L.J. 1 (1990) and "Two Faces of Disparate Impact Discrimination", 59 Fordham L. Rev. (1991).

I. Group of Employment Practices.

I support Section 4(1)(B) of H.R. 1, which allows disparate impact challenge where employees prove that a group of the employer's practices resulted in disproportionate exclusion based on race, color, religion, sex, or national origin, even though the employees cannot isolate which one of the employer's practices was the culprit. I applaud this Section for its modest alteration of the standard articulated in Wards Cove.[2] Requiring that the complaining party demonstrate that "a group of employment practices results in a disparate impact" ensures that the proved impact is attributable to the employer, and not some other innocent cause.[3] This assurance is reinforced by Section

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[1]. 42 U.S.C. §§ 2000e to 2000e-17.

[2]. Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2124-25 (1989) (requiring employers "to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.")

[3]. Cf. Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2125 (rejecting disparate impact based on evidence of imbalance between cannery and noncannery workers because "[t]o hold otherwise would result in employers being potentially liable for

4(4), rejecting disparate impact challenge based on "[t]he mere existence of a statistical imbalance in an employer's workforce".[4] In addition, Section 4(1)(B)(iii) requires the complaining party "to demonstrate which specific practice or practices contributed to the disparate impact" where the records or other information are "reasonably available".[5] Thus, Section 4(1)(B) excuses employees from isolating which one of the employer's practices resulted in the disparate impact to avoid the unduly harsh consequence of dismissing employees' claims when they are unable, through no lack of diligence on their part, to pinpoint that impact from among the employer's practices. Section 4(1)(B) does not excuse employees from proving that the employer is responsible for the disparate impact proved. It seems appropriate to require an employer to respond, either with

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'the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.'"); Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 992 (1988) ("It is completely unrealistic to assume that unlawful discrimination [use of protected factors] is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. . . . It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of the work forces."); Hill v. Seaboard Coast Line Railroad Co., 885 F.2d 804, 813 (11th Cir. 1989) (rejecting disparate impact challenge where impact may result from promotions made prior to adoption of practice); Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795, 801-02 (5th Cir. 1982) (abstract workforce imbalance insufficient to establish disparate impact); Section 703(j), 42 U.S.C. § 2000e-2(j) (prohibiting preferential treatment based solely on statistical imbalance).

[4] Section 4(4) provides:

> The mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation.

[5] Section 4(B)(iii) requires the complaining party to "demonstrate which specific practice or practices contributed to the disparate impact":

> if the court finds that the complaining party can identify, from records or other information of the respondent reasonably available (through discovery or otherwise), which specific practice or practices contributed to the disparate impact.

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evidence to justify or exonerate, when the employer uses a group of practices that result in disparate impact based on race, color, religion, sex, or national origin.

II. Burden of Proving Business Necessity.

I support requiring the employer to bear "the burdens of production and persuasion" in proving that its exclusionary practices are "required by business necessity", as required by the definition of demonstrates in Section 3(m) incorporated into the Section 4(1) of H.R. 1. The employer is required to bear those burdens only after employees prove that one or more of the employer's practices resulted in disproportionate exclusion of women, people of color, or other religious or ethnic minorities. Indeed, Section 4 ensures that employers are not required to defend mere imbalances in the workforce, but rather the employer's adoption and use of practices proved to result in disparate impact on the basis of race, color, religion, sex, or national origin. Moreover, the business necessity defense focuses on affirmative justification, rather than denial, of the discriminatory impact. Consistent with standard practice, it is appropriate to assign the employer the burden of persuasion on that affirmative defense. Finally, traditional evidentiary principles support assigning the burden of persuasion to the party seeking to prove the affirmative allegation, in this case business necessity rather than its negative, and assigning the burden of persuasion to the party who has greatest means of knowledge of the facts, in this case the employer.

III. Definition of Business Necessity.

I support the definition of business necessity in Section 3(o) of H.R. 1 for the following three reasons.

First, the definition includes scrutiny of both the purpose for which the employer's disparately impacting practice was adopted and the means chosen to accomplish that purpose. It is appropriate to examine the employer's purpose for adopting such a practice to ensure that the purpose is sufficiently important or necessary to justify the exclusionary effect of the practice. It is equally appropriate to examine the means chosen to accomplish the employer's purpose to ensure that the practice is sufficiently effective to justify its exclusionary effect. The business necessity standard in H.R. 1 requires examination of both the necessity and the effectiveness of an employer's disparately impacting practice. By that standard, an employer would be permitted to use an employment practice, despite its disparate impact, for the purpose of accomplishing an employer's "significant business objective"; in the case of decisions involving selection, for the purpose of predicting "successful performance of the job". Moreover, by the standard in H.R. 1, an employer would be permitted to use an employment practice, despite its disparate impact, when the practice is shown to "bear a significant relationship" to accomplishing those purposes. This two-pronged examination is fully consistent with the Griggs decision,[6] where the Supreme Court required Duke Power Company to justify its discriminatory hiring criteria by showing that the criteria were adopted for the purpose of accomplishing "a genuine business need", specifically predicting successful job performance, and that the criteria had a manifest or demonstrable relationship to that purpose.

Second, I support the definition of business necessity in H.R. 1 because it requires mid-level scrutiny[7] of both the necessity and effectiveness of the practice. The mid-level scrutiny standard in H.R. 1 requires that the disparately impacting practice "bear a significant relationship to a significant business objective of the employer", and indeed specifies judging or predicting successful job performance to be a significant business objective for employment practices involving selection. This standard is consistent with the Griggs decision, where the Supreme Court approved Duke Power Company's purpose of predicting successful job performance as "a genuine business need",[8] but rejected the Company's business necessity defense because it failed to show that the practices had a "manifest relationship" or "demonstrable relationship" to that purpose.[9]

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[6]. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

[7]. When courts apply mid-level scrutiny under the Fourteenth Amendment to the United States Constitution, they require the government to prove that the classifications "serve important government objectives and must be substantially related to achievement of those objectives." See Craig v. Boren, 429 U.S. 190, 197 (1976) (scrutinizing classification based on sex).

[8]. Griggs v. Duke Power Co., 401 U.S. at 432. The Court examined three employer purposes to justify the use of the disparately impacting high school diploma and intelligence test requirements. The first employer purpose, using the disparately impacting selection criteria to predict effective job performance on the very jobs for which the criteria were to be used, was judged a sufficient business purpose. Second, the Court found the employer's business purpose of abstractly improving "the overall quality of the work force" did not have sufficient relationship to the efficiency of the business to justify the use of the disparately impacting criteria. The Court instead required that the criteria "must measure the person for the job and not the person in the abstract." Id at 431, 436. Third, the Court rejected the employer's purpose of "preserving the avowed policy of advancement within the Company" because the employer failed to justify the purpose "upon a showing that such long-range requirements fulfill a genuine business need". Id. at 432.

The Court in Wards Cove discussed the standard of scrutiny for business necessity in dicta.[10] The standard they articulated -- that the disparately impacting criterion "serves, in a significant way, the legitimate employment goals of the employer"[11] -- appears to require mid-level scrutiny of the effectiveness of employers' exclusionary practices but only rational basis scrutiny of their necessity. Lower courts interpreting the Wards Cove decision, however, have allowed even more deferential scrutiny of employers' business necessity defense.[12] For example, the Seventh Circuit in Allen v. Seidman,[13] remanded the business necessity issue for the lower court to determine whether employees had proved the disparately impacting practice[14] to be unreasonable despite evidence demonstrating that the employer was reckless, if not irrational in using the exclusionary test.[15] Moreover, courts have rejected

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[9]. The Court rejected the effectiveness of the criteria to predict effective job performance, noting first that the employer adopted the criteria "without meaningful study of their relationship to job-performance ability" and second that incumbent employees who did not meet the employer's criteria "have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used." Id. at 431-32 & n.7.

[10]. In Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2123 (1989), a majority consisting of Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy, reversed the lower court and ruled that the racial disparity between cannery and noncannery workers did not establish a prima facie case of disparate impact. Despite its recognition that discussion of the business necessity issue was "pretermitted" by that ruling, id. at 2124, the majority nonetheless endorsed a more lenient business necessity standard than required by prior precedent.

[11]. Id. at 2125-26.

[12]. Some courts have equated employer's obligations to justify its exclusionary practices as business necessity under disparate impact doctrine with employer's admittedly light obligation to rebut claims of consciously intended discrimination under disparate treatment doctrine. See, e.g., International Union, UAW v. State of Michigan, 886 F.2d 766, 770 (6th Cir. 1989) (adopting state's rebuttal evidence from disparate treatment challenge to satisfy employer's business necessity obligation in disparate impact challenge considered for first time on appeal); Mallory v. Booth Refrigeration Supply Co., Inc., 882 F.2d 908, 912 (4th Cir. 1989) (same).

[13]. 881 F.2d 375, 381 (7th Cir. 1989).

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[14] The test had a pass rate for whites of 84% and a pass rate for blacks of 39%, resulting in a black to white selection differential of 47%, well below the EEOC's guideline of 80%. *Id.* at 378. *See* Section 1607.4(D) of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D).

[15] Evidence established that defendant Federal Deposit Insurance Corporation's own consultants repeatedly criticized the test. Moreover, the necessity of the test is suspect where the FDIC itself promoted some who failed the test, and indeed, abandoned the test after suit was filed. But more important, evidence established that there were:

> no set questions, no set right or wrong answers, no fixed passing grade, no instructions for weighting performance on the various parts of the exam, no fixed time limits for the individual sessions, and no evaluation of the panel members. Panel members were not required to attend each session, and if they missed one they graded it anyway, guided by advice of the member or members who had attended. The test emphasized the problems of small banks and as a result disfavored examiners who worked in the large metropolitan areas, where blacks tended to be concentrated. . . . on this record the emphasis in the Program Evaluation test on the problems of small banks is arbitrary. Furthermore, the test failed to test many of the tasks that bank examiners are called on to perform. Nor was the concept of adequate performance defined, for the testers' notes reveal that they would sometimes pass a candidate after rating him "barely adequate" or "marginally acceptable," and sometimes fail one after noting seemingly minor, readily correctable deficiencies. The Corporation discarded all the test papers of candidates who passed and many test papers of those who failed, and continued doing so -- in violation of EEOC regulations -- even after suit was brought. *See* 29 C.F.R. §§ 1602.14(a), 1607.4. As a result it was impossible at trial to determine consistency among the different rating panels. . . .

Id. at 380. *See Evans v. City of Evanston*, 881 F.2d 382, 384-85 (7th Cir. 1989) (remand on business necessity issue despite finding the City's effort to justify cut-off point as "feeble", "consist[ing] of little more than testimony that one standard deviation above the mean is a frequent cut-off point on tests.")

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employers' business necessity defense only in extreme cases.[16] This deferential standard of scrutiny coupled with the deferential burden of proof[17] undercuts disparate impact doctrine, thereby condoning the unjustified discrimination accomplished by facially neutral, but consequentially exclusionary workplace practices.

The mid-level scrutiny standard found in both H.R. 1 and Griggs is appropriate because it recognizes the nation's commitment to curtail discrimination based on race, color, religion, sex, or national origin, whether that discrimination is intentional or not, while respecting employers' business needs. Mid-level scrutiny recognizes the need to challenge business as usual: unsubstantiated claims of efficiency must be tempered by a commitment to neutrality. Consequently, mid-level scrutiny strikes an appropriate balance between equal employment opportunity and employers' business discretion.

Concern that employers will adopt selection quotas rather than defend their facially neutral, but consequentially exclusionary selection practices under mid-level scrutiny are unfounded. First, Section 13 of H.R. 1 expressly provides that the Act should not "be construed to require or encourage an employer to adopt hiring or promotion quotas." In addition, although the mid-level scrutiny standard had been the law of business necessity for almost two decades,[18] employers did not resort to quotas.[19] Moreover, an employer's assertion that its practices are necessary to its business is undermined where the employer chooses to employ individuals who do not meet its standards rather than to justify the merit of its standards. Finally, adoption of quota selection practices will not shield an employer from meeting its business necessity obligations.[20] Indeed, it merely exposes the employer to additional liability for reverse discrimination.[21] Thus, requiring an employer to justify its exclusionary practices[22] by mid-level scrutiny does not undermine merit based selection, it ensures it.

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[16] See, e.g., Green v. USX, 896 F.2d 801, 805 (3d. Cir. 1990) (finding unreasonable employer's bald assertion that its subjective evaluation process enabled company to identify the "best qualified" candidates); Nash v. Jacksonville, 837 F.2d 1534, 1537 (11th Cir. 1988), vacated and remanded, 109 S. Ct. 3151 (1989), reinstated, 905 F.2d 355 (11th Cir. 1990), cert. denied, 59 U.S.L.W. 3562 (1991) (evidence that qualified City employees drafted test was legally insufficient to establish business necessity, particularly where employee admitted he did not evaluate exam as it related to job performance); Sledge v. J.P. Stevens & Co., 52 Empl. Prac. Dec. 39,537 (CCH) (E.D.N.C. 1989) (conclusory assertion that subjective assessments were rationally related to hiring best qualified candidates deemed unreasonable); Richardson v. Lamar County Board of Education, 729 F. Supp. 806, 829 (M.D. Ala. 1989) ("A court should find a test invalid only if the evidence reflects that the test falls so far below acceptable and reasonable minimum standards that the test could not be reasonably understood to do what it purports to do", as was the case at bar); Equal Employment Opportunity Commission v. Andrew Corporation, 51 Empl. Prac. Dec. 39,364 (CCH) (N.D. Ill. 1989) (word of mouth recruiting from exclusively white clerical staff was not justified by cost or "inevitability", particularly where employer encouraged it and where employer affirmatively advertised in newspapers aimed at white markets, ignoring newspapers aimed at black markets).

[17] See Section II, supra.

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[18] Mid-level scrutiny was the standard from the Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971) until its decision in Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115 (1989). Indeed, lower courts recognized that Wards Cove marked a dramatic departure from this long-standing precedent. See, e.g., Green v. USX, 896 F.2d 801, 805 (3d Cir. 1990) (finding Wards Cove to "have relaxed the employer's burden to rebut the plaintiff's prima facie case"); Allen v. Seidman, 881 F.2d 375, 381 (7th Cir. 1989) (finding definition of business necessity to be one "pertinent respect in which the Supreme Court [in Wards Cove] has changed the ground rules for disparate-impact litigation").

[19] Whereas the white unemployment rate since 1965 was consistently below the overall average rate, the unemployment rate for people of color during that same time was consistently almost double the overall average rate. Bureau of Labor Statistics, U. S. Dep't of Labor, Bulletin 2340, HANDBOOK OF LABOR STATISTICS, Table 26 (1989). For example, during 1988 the overall unemployment rate for all civilian workers was 5.5%, for white workers was 4.7%, for black workers was 11.7% and for Hispanic workers was 8.2%. Id. Moreover, over the last decade, of those working full time for wages or salaries, white males have increasingly earned more than black males and women, such that in 1988, the median weekly earnings of white men was $465 compared with black men who earned $347, white women who earned $318, or black women who earned $288. Id. at Table 41.

[20] See Connecticut v. Teal, 457 U.S. 440, 451, 456 (1982).

[21] See Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 640-43 (1987); United Steelworkers of America v. Weber, 443 U.S. 193, 208-09 (1979).

[22] Fear that employers will be responsible for justifying any statistical imbalance in its workforce, without evidence that the imbalance is attributable to one or more of the employer's practices, is belied by Sections 4(1) and 4(4) in H.R.

Third, I support the definition of business necessity in H.R. 1 because it requires that preferential employment practices be justified by "demonstrable evidence", rather than merely "unsubstantiated opinion and hearsay". This requirement is consistent with the Court's decision in *Griggs*. There the Company justified its exclusionary high school diploma requirement as necessary for advancement within the Company.[23] The Company's unsubstantiated belief was proved false, however, by evidence that Duke Power Company promoted employees who lacked that credential in proportion to their numbers.[24] The requirement for "demonstrable evidence", defined flexibly in Section 3(o)(3) of H.R. 1, is appropriate to ensure that disparately impacting practices are in fact effective and necessary.

In sum, I support the definition of business necessity in H.R. 1 because it requires demonstrable evidence that both the necessity and effectiveness of exclusionary employment practices can be justified by a standard of mid-level scrutiny.

IV. Lesser Impacting Alternatives.

I support the resurrection of the pre-*Wards Cove* law regarding lesser impacting alternatives contemplated in Section 4(1)(B) of H.R. 1.[25] By that section, an employee may rebut the necessity or effectiveness of an employer's exclusionary practice by demonstrating that an alternative practice or practices resulting in less disparate impact "would serve the respondent as well". In that instance, the employee would prevail at this final stage of the disparate impact case.

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[23] *Griggs v. Duke Power Co.*, 401 U.S. at 432.

[24] *Id.* at 431-32 & n. 7.

[25] *See Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (rejecting business necessity of height and weight criteria because purpose of predicting successful job performance could have been accomplished by measuring strength directly, presumably a more effective and less impacting alternative); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (dictum) ("If an employer does then meet the burden of proving that its tests are 'job related', it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employee's legitimate interest in 'efficient and trustworthy workmanship' . . .")

The placement of language regarding lesser impacting alternatives appears only in subsection (B) of Section 4(1). This final stage of analysis under disparate impact doctrine, however, should be equally available whether the employee demonstrates the disparate impact of one employment practice, pursuant to subsection (A), or a group of employment practices, pursuant to subsection (B). I, therefore, recommend that the lesser impacting alternatives language be added to Section 4(1)(A).

In conclusion, I support H.R. 1 to ensure that the nation's employment opportunities are distributed either by truly neutral, not just facially neutral, standards or by standards proved to be required by business need, not convenience.

Chairman **Ford**. Your final statement triggered something in my mind. Mr. Dichter, would you repeat for us your explanation of how the language of this bill would lead an employer to impose a quota as an alternative to a more intelligent examination of the discriminatory practices in his employment activities?

Mr. **Dichter**. Mr. Ford, the more difficult you make it for an employer to justify their practices by setting the standard so high and so costly to justify, particularly when you're talking about an overall group of practices, perhaps; when you're talking about higher level jobs; and that you thereby encourage the employer to say, "Rather than going that route and incurring the risk of being found liable, it's easier for me to just make sure that the numbers come in close enough that I don't have the questions of disparate impact."

So it's not a question of a bright line. It's a question of a continuum. That the harder you make it for employers to justify their practices, the more likely you make it for them to simply say, "Get those numbers in order. We don't want to have to deal with justifying that."

Because we're talking about translating this back into how it takes place in the workplace. When top management says to lower-level management, if they see that the burden of attempting to justify the process by which they analyze and promote and consider factors, and maybe justify the college degree for their upper-level management people or maybe their sales engineers, and go to the cost of hiring an industrial psychologist to do that, they may say, "The only way to avoid that, the easiest way to avoid that is simply make sure that the numbers match availability so we don't have to deal with that."

Chairman **Ford**. Well, I can't follow you on how that works. Have you or anyone in the bar in which you practice argued that before any court in this country in any case that we could look at?

Mr. **Dichter**. Argued?

Chairman **Ford**. That the employer was forced into a course of conduct which you described as the imposition of quotas because of the burden of otherwise showing that they were clean on the issue of discrimination.

Mr. **Dichter**. We haven't had H.R. 1 as the law; we've had *Griggs* as the law. And under *Griggs*, what we've seen is a flexible approach to employers being able to justify——

Chairman **Ford**. Now, just a minute. When people play politics with this legislation by throwing the term "quotas" around—and I'm not suggesting that you're doing that at the moment—the reason that it is so divisive in this country is that the average citizen that I represent thinks that we now have a Federal law on the books, and have had for a number of years, that says that her son who is white has to get out of line when they're hiring at the auto plant and give his place to somebody who is not white.

Now, I have never been able to find an employer who is actually doing that. But I have found all kinds of constituents who believe it goes on as a daily affair. So the perception that this thing happens is what people are appealing to.

Now, as a practicing attorney, and I long sometimes to get back in the courtroom where you know who the winners and losers are when you get through, as a practicing attorney you are suggesting something that really puzzles me because then we shouldn't have speeding violations either.

When we set up a "thou shalt not" in the law, we're trying to discourage a type of conduct. All right? And so if we say that we're encouraging a different kind of conduct, it may be as discriminatory as the activities that we're trying to remedy. You're suggesting that that comes about not because of what the statute says, but because employers are too damn lazy and witless. And that's Ms. Perry's final statement: That these decisions ought to be made on the basis of necessity, and not what's convenient.

You're suggesting that employers, when faced with the necessity of examining their employment practices to determine whether or not they are, in fact, discriminatory against people in a way that's prohibited by law, even by the law as it stands without H.R. 1, that given the burden of doing that, they would rather go ahead and violate the spirit of the law in a different way by imposing a quota.

I don't have that little faith. I used to represent business people, too. I don't think they do that. I do know that businessmen have a tendency, and organizations representing businessmen have a tendency to view every regulation with which they will have to comply as being a burdensome thing that's going to provoke thousands of lawsuits.

The arguments never change no matter what the issue before this committee. I would also observe to you that this is the appropriate committee to deal with fairness in the workplace. And from our perspective, that's all we're talking about here. We're not talking about wins and losses in terms of racial groups. This committee's responsibility is fairness and safety in the workplace. And clearly, employment practices are at the very base of fairness in the workplace. That's why it's here.

But I have to take issue and defend employers. You referred to Mr. Schneider's people as high-priced psychologists. They might come to a low-priced lawyer like me and say, "Let's sit down and see what makes common sense in the situation you think you're in. You're being accused of doing something here. Maybe you can demonstrate that there was some neutral or innocent reason why you did this. Let's sit down and use our heads and figure it out."

Now, I used to do that sort of thing as a lawyer with no particular special expertise. I always approached a problem of my client as, "What would a person of plain, common sense think is the result we ought to have here?" And it sounds to me like we're letting lawyers and others get us all confused—even if you put in the statute a provision that says it would be criminal for the employer to engage in quotas, it will still lead to quotas.

I've tried that, incidentally, on one of your colleagues and said, "What if I could get the Congress to agree with me?" And we put in this bill, "It shall not only be frowned upon, but it shall be an illegal act for any employer, in seeking to comply with this act, to impose a quota in hiring, promotion, or any other aspect of the employment relationship."

How would you react to that? "Well, you're putting another burden on us," says he. Now, I catch myself chasing my own tail here. Did you really mean to suggest that while the bill does everything we could reasonably work on to avoid any implication of quotas—we said, in fact, last year no court shall use this bill to justify a quota, I'm paraphrasing the language——that even if we made it illegal to put the quota in, there would be strong temptation by lazy employers to take what would appear to them to be an easy way out. I don't see how it's an easy way out because they're going to buy themselves sex or race discrimination cases, are they not? All race discrimination cases are not brought by black people.

Mr. DICHTER. Absolutely not.

Chairman FORD. And all sex discrimination cases are not brought by women.

Mr. DICHTER. Nope.

Chairman FORD. Well, you know, I'm looking down the road 25 years from now when they reverse that New York test on us. And there are party games that are played because of the peculiar differences in our skeletal structure; it's possible for women to do a little stunt by holding themselves upright against the wall that men can't do.

And somebody down the road, when they take over, is going to start putting that kind of stuff into the test. So I think, in self-defense of my grandchildren, I'm worried about my granddaughters, but I'm also worried about my grandson. We ought to look down the road to see in what it's like if we reverse roles here and see what kind of subtle ways things can happen.

We've passed the stage where civil rights rules and regulations are as simple as they started out to be when people just very frankly said, "We don't hire people like you here. We don't have any of your kind here." That's not how it happens.

And as a matter of fact, I strongly suspect that many of the people you represent paint their way into a corner, not realizing that they don't want people like that working for them, or that they don't believe that women can do the job that a man could do in the same place.

It's not because they have any conscious, mean thought in their mind. So we're not trying to legislate against criminal activity here, or even activity that approaches criminal intent. But we're trying to get people to examine what they're doing and treat people fairly, just fairly. Not specially or with any preference, but fairly.

Now, with that in mind, would you still suggest that the language of this bill would lead employers to choose the imposition of quotas rather than just following common sense about how to remove discriminatory practices?

Mr. DICHTER. Chairman Ford, first let me say that I agree with almost everything you said, and certainly the principles you said and endorse, and so do I. And I have not argued that Title VII, nor *Griggs*, is law that should be reversed or changed for any reason. I endorse those.

I think what you saw today, though, because I'm focusing on a very narrow aspect of this, what are the words that Congress would choose to describe what the burden an employer would have if there is a disparity shown in a single or group of practices. And you saw here today two other examples, with Dr. Schneider and Mr. Rose themselves saying, "Well, I have one set of words you want to use." I have another set of words. We have the draft of the legislation's set of words. We have the committee—the drafters of this legislation's set of words.

And the problem is we're trying to draft something that fits all purposes. The more restrictive we make that, the more constrictive we make those words, as Dr. Schneider was suggesting, that the words perhaps as drafted now don't go far enough. They're too restrictive. Mr. Rose may suggest that Dr. Schneider's words go too far.

I urge you, as you're thinking about trying to legislate what the courts have attempted to do over the last 20 years by looking at it on a case-by-case basis and saying, "We're going to look at that firefighter exam." And in this case, we can deal with that. We'll find the words when we put it to the facts. And we'll find the words in each of those cases. Whether it's higher requirements, whether it's written exams, we'll find the words because we understand the concept.

And we've applied—and as we try to draft those, I suggest that's where we begin to get into trouble, particularly where you apply it to jobs which by their very nature are subjective. How you go about choosing your counsel and your staff and the kinds of factors you consider. How we grant tenure in colleges. Is it necessary for someone in college to have published to be an effective college professor? Should we challenge that requirement?

Chairman FORD. Well, I just want you to know that I'm very sensitive to the fact that this is not a college graduate school exercise that we're involved in here, but real life and real people. And while you were talking, I recognized a representative of the White House who was here observing. And I can just picture him running back over there and saying, "I told you so. This guy Mark Dichter says that this bill, the way it's drafted, will lead to quotas."

Now, if that filters through the system, we're going to have a hard time. I'm hoping to work with the administration and get something done here.

Mr. DICHTER. I would hope so.

Chairman FORD. But when you drop those little bombs, they don't just sit in this room. They have already, as a matter of fact, have gone out the door.

My time is up. Mr. Fawell.

Mr. FAWELL. Thank you. This is as arcane a piece of legislation. I feel frustration. We all do. And we have three good legal minds. I hope the Chairman will stay with us because I respect his abilities.

Chairman FORD. I'm just going to go over here for a minute.

Mr. FAWELL. I want to, first of all, say to each of you I think it was as close as we've gotten to objective testimony, and good testimony, as witnessed by the fact that everybody does have questions about business necessities definition. Perhaps not everyone.

And I do note that the defense attorneys seem to lean one way, and the plaintiffs' attorneys do seem to lean the other way, which has been a constant that I suppose will never change. And maybe what we do need sometime is to have some ordinary taxpayers come in here and look at something like this, too. And unfortunately, none of us have all the time we should have.

To me, and I've got a hypothetical I'd like to extend to you folks. But to me, quota are determined by the kind of standards which we set forth in reference to establishing a prima facie case. And I am troubled by what I read.

Plus, the definition of business necessity. I think all of us have said there the definition is too light; it dilutes the right of minorities. Understandably so. If it's too tight, it may dilute everyone else's rights. We may make it impossible, for instance, for employers to ask, "Have you graduated from high school? What outstanding credits did you receive? What type of awards?"

Because the definition of business necessity may be construed, who knows, but the courts cannot allow that to occur. I'd even add a third in regard to quotas. And that is, and I would differ here with, I think, Mr. Kimerling, said that compensatory damages and punitive damages don't pertain here. Well, they do in the total question of quotas because the second count of every complaint is disparate treatment.

And in several of the cases we have heard, I think they are good disparate treatment cases, but they're trying to establish it under disparate impact. And then when we look at the bifurcation definition of business necessities, and now we have much more than just selection processes, but basically are going after all employee benefit programs; they also will be subjected to disparate analysis, including wage plans, pensions, etc. The whole works also are going to be subject to unintentional discrimination.

And how we have to remember that we're talking about something the legislature never in its wisdom created—unintentional discrimination. It was created by the courts, and it was a good Supreme Court that did that. And the Supreme Court went on and refined it as the cases came.

And suddenly it became an evil Supreme Court when subjective disparate impact analysis came along, which is different from pass or fail tests and so forth.

But here is my—I hope I'm not going to be bound completely by that five-minute rule, and I'd love to have the Chairman and others come back. Here is how one—I would classify myself, though an attorney, really as a layman on this subject—would look at this.

Under Section 4, it seems to me, a complaining party can prove that a group of employment practices causes disparate impact on the basis of, let us say, race, could be religion, national origin, sex. I guess it could be on mental and physical disabilities now. But without ever specifying any employment practice or employment practices actually caused the disparate impact.

All the complaining party would have to do is introduce, as I see it, statistics showing a disparity between the racial composition, let us say, of the jobs at issue and the work force qualified for those jobs. Then, as I read it, he can rest. He had proven his case because he doesn't have the obligation to come in with any kind of examples, any specific employment practices.

And that forces the employer to disaggregate all of his hiring practices in order to disprove one by one the negative presumptions that somewhere in his hiring practices there was one or more employment practices which caused the disparate impact. Which brings me to mind, if I can just interject this, Tom Sowell's comments, as to the question of quotas. And he said, "In many of these cases, nobody on either side can prove anything. And so, whoever gets stuck with the burden of proof is almost certain to lose, regardless of innocence, intent or happenstance."

And it's especially true, it seems to me, as we invade the area *Wards Cove* was involved in in regard to subjective criteria, which is what most of us in this body use, every one of us. We select the people who will serve us, and we do it on subjective criteria—maybe a writing test, interview, the appearance. Is there fire in the belly? Is this an innovator? Will he or she do the job and so forth and so on.

I'm afraid we'd all be in serious trouble if the act were really, truly to apply to us and we could be dragged into court on a one-two count that could also allege the possibility of intentional discrimination.

So if the court, then, to continue with my hypothetical, were to find the complaining party could identify by discovery or otherwise from the records or other information of the employer that a specific employment practice or employment practices contributed, not caused, the disparate impact, the complaining party, again, would be deemed to have proved the employer guilty of having caused a disparate impact.

At least that's the way I read it. All of which would appear to tell an employer that he should think again if he was contemplating using, as hiring criteria, any of what I would deem common sense, but nonstandardized subjective practices such as interviews, supervisory ratings, applicants appearing as bright and highly motivated, or even having an exemplary academic record in high school.

It would appear that it would be better that the employer go with accepted methodology for establishing job relatedness on the basis of objective pass/fail instruments or practices, or what industrial psychologists might recommend are standardized tests to determine the quality of the employee.

For the employer who uses subjective employment practices, especially, I think the burden when dealing with aggregated subjective employment practices would require decision making basically aimed at quotas, rather than business judgment, in order to avoid the costs which would be required to even attempt to defend the challenged criteria for the employment practices.

And then, even if the employer succeeds in his defense, whatever the business necessity defense might ultimately be worked out as being, too tight or the opposite, but if he succeeds he would still be guilty of causing the disparate impact if the complaining party demonstrates that a different employment practice or group of employment practices with less disparate impact would serve the employer as well.

It doesn't even say the disparate impact shouldn't be more costly. It just simply says if there's another one out there, whether it's accommodating or can be afforded, then you're still guilty. Now, my conclusion, therefore, is as an employer, give me safe harbor, especially when the second count that they're going to shoot for is a potential million dollar lawsuit for intentionally doing all these things.

If nothing else, I want to say that there is some reason for people to look upon this as quotas, though I see my distinguished and lovable friend from Texas shaking his head at what I have said.

Now, that's the question. If there are any comments from any of you, I'd appreciate receiving those.

Mr. ROSE. Sir, let me point out that the law, as it stands now, requires employers of any size to maintain records which disclose what the impact on the grounds of race, sex or national origin is of its practices. So if the XYZ Company, USX for example, uses interviews by forum as a basis for hiring steel workers, and if the employer is following the law, you can track which of those practices is having the adverse impact.

Prudent employers of—I can't remember but I think it's over 100, but whatever the size is, are going to follow the EEOC regulations which have been incorporated, under which recordkeeping is required.

Mr. FAWELL. May I just inquire this? Are you saying that every employment practice which, for instance, I as a Congressman would utilize in reference to new employees, I have to keep and maintain records on all of the subjective evaluations which I will frankly say is 95 percent of the basis upon which I would hire employees?

Mr. ROSE. The employers of over 100 people are obliged to keep records of what their practices are and what the impact of those practices is on grounds of race, sex and national origin. That's the law. It has been since 1978. It was probably the law before that.

Mr. FAWELL. Is that only on selection procedures?

Mr. ROSE. Yes, sir. These are part of the Uniform Guidelines on Employee Selection procedures. And so, the Supreme Court in *Wards Cove* made reference to those and noted they were the law as a grounds for saying it's not impossible for the plaintiff to show which practice causes the adverse impact.

Mr. FAWELL. May I ask what does an employer do who basically, as I do, and I think as the Chairman and I would suggest even the gentleman from Texas does, all of the members here. You have an interview of several people, and you might have a writing test. You would look at their academic records and things of this sort; their work records, you want basically to have some of the brightest that you can possibly get.

Mr. ROSE. Certainly.

Mr. FAWELL. Would all of that stand up under this legislation? It's all subjective. How could——

Mr. ROSE. Well, let me say that as the bill is written, and I commended the committee for this and I urge you to consider this too, I think the purpose of the legislation is to restore *Griggs*. I think if you say that in the bill, which the bill now does say, the various horribles that one side or the other are going to say "too strong" or "too weak" are mitigated by the clear purpose of the committee in stating their intent to restore *Griggs* and to overrule *Wards Cove*.

But let me just add that the plaintiffs can make a——

Mr. FAWELL. But wouldn't they still be able to come in and prove or just allege a group of employment practices, not have to specify anything in particular?

Mr. **Rose**. They can't ever make a prima facie case against you because you're too small. You don't have——

Mr. **Fawell**. Thank goodness for that. What about those who have the sin of being too big?

Mr. **Rose**. But you can't get statistical significance—why would one assume that if they were going to use subjective practices fairly that that would tend to exclude blacks in such disproportions, or women or whatever the group is, why would you assume that a fair interview and a fair assessment of the practices would result in such a severe disproportion that it is statistically significant?

Mr. **Fawell**. I wouldn't assume that. I——

Mr. **Rose**. And if, in fact, the employer's practices do not result in that kind of exclusion, then the whole disparate impact side of any possible charge is gone.

Mr. **Fawell**. But if the end result is, for instance——

Chairman **Ford**. Mr. Fawell, I don't want to be unduly cognizant of that red light, but there are members who have been here since 9:30 this morning who haven't had a chance to ask any questions. We'll come back to you after they've had a chance if you have further questions for this panel before they leave.

Mr. Payne.

Mr. **Payne**. Thank you very much. I really don't have a question, but this whole notion of subjectivism and objectivism is really something that I try to come to grips with.

If we use a strictly objective standard of testing, we do find that people who tend to have less of a background educationally because of the level of education from a particular area tend, then, to do less. And therefore, you would almost say you would prefer subjectivism.

But in subjectivism you tend, once again, to have it appear like a somewhat discriminatory kind of judgment in a lot of instances. I just would like to mention that we find that the unemployment rate for minorities is about double that of whites.

When we look at the military, we find that the military has about twice the number of blacks as it is reflected in the population. We are very proud of what occurred in the Persian Gulf with the outstanding performance of our military.

So I've been kind of tossing that around to try to understand why we would have an unemployment rate for minorities that's twice that of whites in the United States. In the military we have twice as many minorities performing, but we're all wearing yellow ribbons and flags because we've done so well.

So I'm trying to, in my own mind, justify testing. And why is it that in the military when the opportunity is given to individuals they tend to excel. But we run into a lot of these barriers that really create a disparate impact on groups. And it's really not a question, but I'm trying to formulate a trend of thinking, which just goes to prove to me that the manner in which we do testing and screening and so forth is totally invalid, if we use the military experience as a test because we're very successful there.

So I'm just trying to come to grips with some of these notions. But, Mr. Chairman, I don't have a question but the correlations seems to be a little bit out of sync so far as it relates to the success in one area whereas we have all of these other superficial barriers in other areas.

But I'll yield the rest of my time to my colleague there.

Chairman **Ford**. Mr. Washington.

Mr. **Washington**. Thank you, Mr. Chairman. I really wish that we had a better forum in which to develop these. I feel the amount of time isn't sufficient—and that's no criticism of anyone. It's just impossible. Sometimes you talk to yourself or to each other without really getting at the real issues—and so since I'm limited by time, I'd like to—I'm not picking on you, Mr. Dichter. Is that the right pronunciation?

Mr. **Dichter**. Yes it is, sir.

Mr. **Washington**. Let me get to a couple things. Would you agree with me that—my light's yellow already.

Chairman **Ford**. You're still on Mr. Payne's time. We'll give you another green light.

Mr. **Washington**. Thank you, Mr. Chairman. That at least in theory the law as we and Anglo-Saxon jurisprudence have evolved from England, is that for a wrong there should be a remedy?

Mr. **Dichter**. I think that's a fine general principle. Yes.

Mr. **Washington**. Yes. That is a goal that we seek. That is not to say that for every wrong there is a remedy.

Mr. **Dichter**. That's correct.

Mr. **Washington**. But when the law is able to recognize a wrong, we attempt to evolve a remedy that meets that wrong, the purpose of which is to avoid the fact situation which led to the wrong to begin with.

Mr. **Dichter**. I think that's true in a general sense. We're talking frequently—I mean, the problem that is that that's a very, very general question.

Mr. **Washington**. Yes.

Mr. **Dichter**. We sometimes define what's wrong, and we sometimes change our minds about what's right or wrong.

Mr. **Washington**. Discrimination is wrong.

Mr. **Dichter**. No question about that.

Mr. **Washington**. Okay. We, based upon going back to the Magna Carta and coming forward, have established the principle in this country that people should not be treated differently because they look different or act different or are different. Is that right?

Mr. **Dichter**. That's——

Mr. **Washington**. Neither the rich man nor the poor man can sleep under the bridge.

Mr. **Dichter**. Those principles are generally true. Yes.

Mr. **Washington**. All right. Now then, when we talk about disparate impact and these high-sounding notions, we're first talking about a situation in which a person, for whatever reason, has been discriminated against. Is that right?

Mr. **Dichter**. When we talk about disparate impact, we are talking about a situation where a given individual may have, as a result of a selection device, not obtained a job. And I think we have defined that as discrimination, even where that requirement is a neutral requirement.

Mr. **Washington**. You're getting ahead of me.

Mr. **Dichter**. Okay.

Mr. Washington. Let's start at the baseline. Would you agree or disagree that in a courtroom setting, when a person has made out a prima facie case of disparate impact, they have proven that they have been discriminated against?

Mr. Dichter. The problem is that you could have a disparate impact finding but not necessarily everyone who was in that group has been a victim of discrimination.

For example, you could prove that the high school degree requirement discriminates against blacks since you have a class of blacks. Now, every black in that class may not have been discriminated against as a result of that. They may not have been hired for some other reasons.

So that merely the fact that you find that the high school degree requirement has a disparate impact doesn't mean that every black who applied was necessarily a victim of discrimination. That's why I had a problem with that general term.

Mr. Washington. All right. You, in your remarks, you addressed a question of the ability to challenge a group of practices.

Mr. Dichter. Yes.

Mr. Washington. I want to relate it back. You were present earlier when the firefighter from New York testified. Why shouldn't the employer, the City of New York, rather than the employee, attempt to prove whether it was the dummy carrying, a hand grip, a broad jump, a flexed arm hang, an agility test, a ledge walk or one-mile one that resulted in the disparate impact? Why should she have to prove that, which one of those seven?

Mr. Dichter. The question now we're getting to, which was raised earlier, is how far—how to you define the word practice. Is it the entire test? Is it each question on the test? Or is it the entire process? I don't think we're arguing—I'm arguing—that, for example, if you had a test that had 100 questions, that the plaintiff would have to point to which question in there had the impact.

Mr. Washington. No, neither am I. But I gather that from my good friend from Illinois, his notion of group practices and his objection to the employer having to prove which among a group of practices.

You don't really have any strong disagreement with the necessity that if a person can show as a result of these group of practices, but they can't with specificity show which one of the practices resulted in, but everybody agrees that the results are the same, you're not saying that the employee should be put to the burden of having to prove which one of those it is, are you?

Mr. Dichter. It depends on how far you carry that.

Mr. Washington. Well, let's use these as an example. Let's say that these are the group of practices—the ones that I read out for the firefighter. What sense would it make for the employee, the prospective firefighter, to have to prove which one of these resulted in the disparate impact?

Mr. Dichter. I don't have a problem with that. I have a problem if you then say in addition to that physical test, there's a written test; there's an interview; we look at their educational requirements; and we have 20 factors that we look at.

Mr. **Washington**. There was no complaint about the written examination, sir. Almost all of the women passed it. 389 women passed the written exam; only 88 took the physical test.

Mr. **Dichter**. That's precisely my point. That what they did in that case is what I'm suggesting what should be done. They challenged the physical test.

Mr. **Washington**. Yes.

Mr. **Dichter**. They didn't challenge the overall process.

Mr. **Washington**. No.

Mr. **Dichter**. They identified——

Mr. **Washington**. They challenged the group of practices that resulted in the disparate impact. You always do that. A good lawyer would do that anytime, wouldn't he?

Mr. **Dichter**. The problem we have—I think our difference is over the word "group."

Mr. **Washington**. Okay.

Mr. **Dichter**. Under the way the law is written, I would view it as the plaintiff in that case being able to come in and say the group of practices includes the written test, the interview, the physical test. And I don't have to point to the physical test. I just say—I look at the total number of people who applied for firefighter. I look at the number who were hired. And something in that whole ball of practices—written, physical, oral, interview—I'm not going to point to the physical test. I think that's where the problem is.

What they did in that case, which I agree is the law and should be the law, is they pointed to the physical test. But under the words here they could point to the entire process to get——

Mr. **Washington**. I don't agree. You say that's your interpretation of H.R. 1?

Mr. **Dichter**. Because it makes no limit on the term "group." Clearly, the written test——

Mr. **Washington**. You're applying it in a vacuum, though. Let's apply it to a real life situation. How many lawyers do you know on either side of the bar who would come in and complain about a test upon which their clients were successful?

Mr. **Dichter**. No, no. They're not complaining about the test. They're complaining about the overall process. They say we're not going to look at any element of the process. All we're going to look at is the beginning, that is, how many people applied, and ultimately how many people got hired. And if there are 20 steps in that—physical, written, oral—we're not going to distinguish which one we're challenging. That's where I have a problem.

Mr. **Washington**. Okay. You're saying that they have to be specific as to each individual one and show how it——

Mr. **Dichter**. Not each question on the test. Not each part of the physical test.

Mr. **Washington**. No. Each different kind of practice.

Mr. **Dichter**. Yeah. Just as the firefighters did in that case. They challenged only the physical part of the test.

Mr. **Washington**. So you would lump, then, all of the physical examinations together as a practice?

Mr. **Dichter.** I don't think anyone's ever argued that that wasn't a specific based challenge. No one ever said before that that you couldn't take the tests together and challenge the sentence.

Mr. **Washington.** But I bet you if we get an opportunity to engage my colleague that is not the position that he holds. He would argue that if you're going to challenge these five or seven physical things, you ought to be put to the burden of proving which one of the physical things it was. And you don't agree with that, do you?

Mr. **Dichter.** I think that there's not an opportunity——

Mr. **Washington.** Either you do or you don't.

Mr. **Dichter.** I do not agree with that.

Mr. **Washington.** All right. Thank you. My time is up.

Chairman **Ford.** Ms. Mink.

Ms. **Mink.** I yield my time to the gentleman.

Mr. **Washington.** I thank the lady for yielding. Now, let me get onto the second question: standard of burden. Now let's talk about that for just a moment. You said that—I'm going back to your testimony—you said there were three aspects that you wanted to discuss with us. The first was group of practices, the ability to challenge a standard of burden. Whom do you think should have the burden once you've established a group of practices?—let's use an example.

The physical examinations in New York resulted not in a disproportionate number of women not being hired, but it impacted women in a way in which it did not impact men. Would not a logical person, then, look to these to see whether there is something about those that's fair? And fairness is a question of whether they exclude women to the exclusion of men for a fair reason, or whether they just exclude women and there's nothing related to the job the women or the men would have to do that would make that a requirement of the job.

I'm trying to take it out of the legal mumbo-jumbo. And really, what I've been trying to do, counsellor, is to think of this if each one of these was a jury question, rather than law questions, because sometimes we as lawyers obfuscate what the real intention is. And it's not for lawyers. If we had to couch this in terms of a jury question, what would you ask a jury on a question of whom should have the burden of proof once you've been able to demonstrate that these tests, for whatever reason, however unintentional, do discriminate against women?

Whom should have the burden of showing that there is a nexus, a relationship between the test that discriminated against women—the jury already having found that in the previous question—and the job that they were being hired to do? Who should have that burden?

Mr. **Dichter.** I'm not troubled with that burden being the employer's burden, as long as the burden is a realistic one.

Mr. **Washington.** And realistic in terms of?

Mr. **Dichter.** Well, I think you heard different definitions here today.

Mr. **Washington.** I agree.

Mr. **Dichter.** That's the problem.

Mr. WASHINGTON. I agree. But you would agree that at least in *Griggs* what the unfortunate reference is to what most of us believe was the same thing, don't you agree that the court wasn't setting up four different standards that—manifest relationship, demonstratively reasonable, measure of job, related to job performance? Those are just lawyers' ways of saying the same thing over and over and using different words, unfortunately, to do it. Wouldn't you agree with that?

Mr. DICHTER. I don't know how we define the "other than" in words, but I agree with you there are various attempts to get at the same concept. Yes.

Mr. WASHINGTON. Causal connection would probably have been a better term than all of those. It's the lowest common denominator of all of them, isn't it? A causal connection—remember that from *Pfalzgraf* v. *Long Island Railroad*?

Mr. DICHTER. But I'm not sure how you apply that phrase to justifying the employment practice.

Mr. WASHINGTON. That is a relationship between what barriers—not barriers, I don't want to use a negative term. The qualifications that you're looking for, whether it be subjective or otherwise, and the job that you want the person to do.

Mr. DICHTER. Right.

Mr. WASHINGTON. There should be a connection between those. You shouldn't be measuring for things that you're not hiring for, right?

Mr. DICHTER. I agree.

Mr. WASHINGTON. Going back to *Griggs* and the high school test, now one other thing. You said—the third thing you said was even if the employer meets the burden, then when the employee, the plaintiff, can show an alternative less——

Mr. DICHTER. That has a lesser impact.

Mr. WASHINGTON. [continuing] less impacted kind of test, I guess, that accomplishes the same purpose, that the plaintiff wins and you were troubled by that.

Mr. DICHTER. Yes.

Mr. WASHINGTON. Is there any way around that—would you just excise that from the bill altogether?

Mr. DICHTER. No, I think the way the courts have dealt with that in the past, and there's two ways to deal with that. One is to say you have to go a step further. Either find that there was pretext, that is, the employer didn't do that; knew about it and didn't do it. And therefore, we can say the employer did something wrong.

Or say to the employer, "Well, now that you know about it, do it." I don't have a problem with that.

Mr. WASHINGTON. Okay.

Mr. DICHTER. What I have a problem with is saying we're going to hold you liable because you didn't do something you didn't even know about, and until we go to this court, no one even suggested would work.

Mr. WASHINGTON. Okay. Would it be fair then—and I accept that as fair—to latch on to what Mr. Rose said earlier that when you have, as you do have in the body of case law in employment discrimination, continuing evolution, that as an additional requirement of the recordkeeping, that when it's made known to an employer that something like this, that there's another test available, that that be documented and recorded so you don't end up in a situation.

What it's intended to prevent is the employer going down this long road and saying, "King's X, guys, I didn't know that there was another standardized test out here available that would have done a better job of measuring. Had I known about it, I would have opted for the other test."

Would you think that that would be fair?

Mr. DICHTER. Well, I think that's in essence incorporated within the context of pretext. That if, in fact, it's so widely known that everybody else—every other fire department is using this other test, and you're not using this test, I think a plaintiff in that case would have a pretty good case of proving pretext.

Mr. WASHINGTON. Okay. Could we just turn it around, then? If that's fair, let's turn it around and say, "Wherein, under the circumstances, it can be demonstrated by the plaintiff that there was another test available, that the employer knew about or should have known, and exercising reasonable care should have known about, then, you will create a presumption that the continued use of this test and the allegation that they didn't know about the other test was a pretext for discrimination."

In fact, you're getting close to intentional discrimination when you get to that point, aren't you?

Mr. DICHTER. Well, I think that inherent in the pretext context is an intentional discrimination, although not necessarily shown by direct evidence.

Mr. WASHINGTON. All right. And the last thing, the reason I was nodding my head no to my good friend over there, he was mixing apples and oranges when all the time we've been talking about unintentional discrimination he started talking about these one million dollar damage awards and punitive damages. He's talking about intentional discrimination, is he not?

Mr. DICHTER. He, as he—I think correctly stated. But also correctly stated that you quite frequently see the claims joined together.

Mr. WASHINGTON. Okay. But if you can prove intentional discrimination, why would you—if you make a prima facie case of intentional discrimination, as a good lawyer, why would you even fool with an unintentional discrimination case?

Mr. DICHTER. Because, in fact, it may be easier to make out a case of unintentional discrimination.

Mr. WASHINGTON. No, no. Assuming that in the trial of a case you put out enough evidence and the necessary requisite motions have been made on the other side and the judge has overruled them, and in effect has said that you, Mr. Plaintiff, have made out a case of intentional discrimination, you may now go forward and put on your evidence on unintentional discrimination. My question is: Why would you want to do it?

Mr. DICHTER. I'm not sure that's the way it usually works. You don't get a decision on one theory before you get it on the other. You try them both together. And you don't know till the end whether you've won on your intentional theory.

Mr. Washington. I understand that. But I want to isolate it for the purpose of that discussion. I mean, you know when you're trying the case how well you're doing. You have some idea on how well you're doing. And if you have made out a case for intentional discrimination—let's assume for the sake of discussion that by whatever measurement you want to make you have made out a case of intentional discrimination, whether it's bifurcated or not. For one case it depends on what kind of case it is you're trying it to a jury or not to a judge.

But let's assume that you've made a case of intentional discrimination. My question recurs: Why would you want to fool with unintentional discrimination at all?

Mr. Fawell. Would the gentleman yield to that?

Mr. Washington. Because I know that there are no defenses to intentional discrimination, are there?

Mr. Dichter. Well, there are, but I don't think we need to get into that at the moment. I would suggest that really it's a question better posed to Mr. Rose because I'm not sure he's prepared, when he thinks he's made out a case of intentional discrimination, to abandon the disparate impact theory.

Mr. Washington. I yield to my good friend.

Mr. Fawell. The only point I wanted to make is I was looking at it from the viewpoint of the employer prior to any trial or charges coming in. And he knows that there's going to be a two count, at least two count, complaint. And at that point, obviously, he had to make some decisions as to what he shall do. Or even before the cases even come in he has to look and see what could be confronting him.

The average employer is going to take into consideration the fact that he could be hit on an intentional discrimination charge in count two with a rather large compensatory and/or punitive damages award. And therefore, he takes that into consideration overall in determining whether or not he will seek safe harbor and go quotas, rather than trying to meet all of the standards of this legislation.

Mr. Washington. If I really believe that, then I believe that we quit this nonsense and just make it a criminal offense. But the same people who are up here crying about this notion of quotas, it's offensive to me because it only connotes one thing. That is, you're hiring people who are not qualified for a job.

Quotas doesn't mean anything other than that to me. If it means something other than that to someone else, let them say so. And it's offensive to anybody who has attempted to bring a level playing field, if you will, to all people in America. Nobody's looking for anything. All we want to do is stop discrimination.

And the day that we stop discrimination, we don't need any more laws like this. But you and I both know that there are people out there who will discriminate if given an opportunity. To use your expression, the harder you make it for an employer to justify practices, the more likely they are to hide by the numbers.

The corollary to that is, of course, as you know when you play chess, if the black piece moves first it most often wins. If the white piece moves first, it most often wins. That's why the white piece most often wins. So you turn that over.

The harder you make it for an employee to challenge practices, the more likely you are to allow employers who have a will to discriminate the ability to do so. Would you agree with that also?

Mr. DICHTER. I agree with that.

Mr. WASHINGTON. And the bottom line is nobody's looking for quotas because we shouldn't have quotas in America. And as the Chairman said, by the year 2005 or so, white men are going to be in the minority. They're going to be looking for the same protection of the 1964 Civil Rights Act and the 1866 Civil Rights Act. And others, unfortunately, have to find safe harbor under them.

The bottom line is if we can find a way to satisfy the specific objections that you have—I think we got close on the question about employers and the burden of proof on the alternative remedies available or the alternative tests available.

Aren't we getting close to really finding some common ground upon which we can move this bill out of here without all this name-calling and go on to other issues, because we have lots of other problems to solve in our society? And the Congress, in my judgment, has spent a disproportionate amount of time addressing something that should have been addressed a long time ago. Would you agree with that?

Mr. DICHTER. Certainly I agree that if we can find a mutually acceptable approach to this, that that's the best for everyone. But this isn't the most efficient process for all of us to be here if we could resolve it. I agree.

Mr. WASHINGTON. Well, essentially, you agreed on the standard. We're close on the alternative procedures, which I think can be worked out fairly easily on both sides. The biggest problem is the group of practices, isn't it?

Mr. DICHTER. I think that's right. And I must say while I don't represent any particular group here, I think in fact that probably is the principal focus and the difference between the administration's proposal, as I understand it, and H.R. 1. That deals with the question of group of practices and the question of the definition of what the standard is to be met once a disparate impact is shown, as to this part of the bill, as to the *Wards Cove* part of the bill.

Mr. WASHINGTON. Thank you, sir. Thank you, Mr. Chairman.

Chairman FORD. Did you want another round of questions?

Mr. FAWELL. Well, I would like to just try to clarify the group of employments question. I'm not sure if I followed the comments of my friend from Texas. But the problem I have, and I'll be more than glad to have this cleared up in my own mind.

The establishment of a disparate impact cause of action under Section 4, as I read it, would enable the complaining parties simply to allege a group of employment practices. That is, the end result of all these employment practices, Your Honor, somehow ends up with a disparate impact where the composition of the people in the jobs in issue do not match with the relevant and available job supply out there.

But when the statute goes on and further says, by the way, in proving the group of employment practices, you don't have to specify any kind of employment practices that may have caused this. So you just sit back and say, "Well, I don't have to do this."

There's a confusing section that also states that, referring to clause three, that if the court finds that the complaining party can identify from records or other information of the respondent reasonably available through discovery, or otherwise, which specific practice or practices contributed to a disparate impact, seemingly saying, as far as I can see, that you don't have to prove it caused the disparate impact, but it contributed to the disparate impact.

Then, apparently, proof of that, which would be a lower threshold form of proof of disparate impact, would come in. But in those instances where you do have a great deal of subjectivity, as is the case of most small businesses in America at any rate, it seems to me that you can simply allege the group of employment practices and sit back. You'll put your statistics in, but since you don't have to prove the specific employment practices, you're done with your proofs. And then the employer is stuck with having to try to prove the negative.

Now, my point is that what we're doing at this point is confusing disparate treatment with disparate impact. It almost seems to me that if you've got a situation that's so bad that you can show that the total employment practices is causing this kind of egregious situation of disparate treatment, you've got, first of all, an awfully good chance of showing intentional discrimination. You ought not to make it, thus, such an easy thing, as I would see it, for the plaintiff to be able to prove his case under disparate impact, that the employer is given impossible odds.

As Tom Sowell, the columnist, has stated it, and as I stated it, it's a battle to determine who's got the burden of proof of an impossible burden. And bango, if the employer gets it, he's stuck. And not only is he stuck, but if he is successful, by some wild stretch of the imagination of being able to show business necessity, depending on whose business necessity definition we finally adopt here, you lose anyway because there's an employment practice out there where there can be less, not eliminate, but less disparate impact. Which under this definition is still a violation of the act because they say you only have to show that an employment practice contributes, not causes.

And so they're going to come along with this alternative method which will bring less disparate impact but not eliminate it. And then they come back and say that even after you've established that, tomorrow they can file another lawsuit against you because, hey, you're still contributing to disparate impact.

Mr. Washington. Will my friend yield?

Mr. Fawell. Now, but the question—and I will certainly be glad to share whatever little time I have left. My question is: Is this goofy reasoning on my part? I mean, this is the way I look at it and I'm concerned. I'd like to put that to Mr.——

Mr. Kimerling. I think it is goofy reasoning.

Mr. Fawell. Excuse me. I'd like to add——

Mr. Kimerling. I'm sorry. I thought it was a question to the panel.

Mr. Fawell. He was responding to the gentleman from Texas and I thought that perhaps he didn't agree with me on that.

Mr. KIMERLING. No, Mr. Fawell. I do not agree that as you described it, as the bill is now written, those are potential problems with the bill.

Mr. FAWELL. And I think rather severe. But I do agree——

Chairman FORD. Will you let the other members of the panel answer?

Mr. FAWELL. Yes, I'd be more than glad. I do agree that we ought to be able to get together on something like this. I do agree with that. Yes, more than glad to have the others respond.

Mr. KIMERLING. I think it's goofy reasoning because you continue to avoid the clear language of the provisions of the act that absolutely undermine all the things that you've suggested could happen in your hypothetical.

If it's clear from a group of practices that individual elements have a disparate impact, the plaintiff is put to the burden of showing that for those practices. If Ms. Berkman came to New York, applied for that firefighter job, took a written test, took a physical test, did an oral interview, was rejected, and comes up with the same statistics as she did in her own litigation; the city hasn't told her whether she failed the written, failed the physical, or was rejected because of an oral interview.

Her only recourse is to say, "Look, there are no women on this job. Something went down that wasn't right. I'm going to sue the bastards. And if his records show what it is, I'll attack it." She had the ability in this instance——

Mr. FAWELL. But she does have discovery. She can find out that.

Mr. KIMERLING. That's right. She gets discovery. And this is exactly why the act has that little (iii) which says when you have discovery and you can identify it, that's where your burden is. That's the first problem with your hypothetical.

Mr. FAWELL. But doesn't it also say, though, if you utilize the discovery mode to show that the employer has records or information in reference to the employment practices involved, then all you have to show is that they contributed to the disparate impact. It doesn't say that you have to show that it actually caused the disparate impact.

Mr. KIMERLING. I think that's an absolute misreading of the statute, that is not intended to suggest that at all. It still must be an element of the disparate impact caused by those practices. I'm sorry. I just can't see——

Mr. FAWELL. Well, it uses the word——

Mr. KIMERLING. I understand it uses that word, Mr. Fawell, but it doesn't read in the way that you're reading it. That is, if——

Mr. FAWELL. Which specific practice or practices contributed to the disparate impact, not caused the disparate impact. So he gets a lower threshold of——

Mr. KIMERLING. But the whole point is that you're misreading that provision. You're reading one word out of context with the rest of those provisions. And it doesn't say that at all.

Mr. FAWELL. It uses the word twice. The word "contributed."

Mr. KIMERLING. It does use the word "contributed." There's no issue on that. We all can read it.

Mr. FAWELL. Well, wouldn't you agree it should use the word "caused" then, or "results in?"

Mr. **Kimerling**. It is in the context of what is his ultimate burden, which is to show that the practice has a discriminatory impact and is not job-related. It is the burden on the employer. I don't see how you can read it any other way.

Mr. **Fawell**. But would you agree, then, that we ought to take the word "contributed" and supply in lieu thereof the word "cause" or "results in?"

Mr. **Kimerling**. The initial showing of disparate impact will include a number of practices. That's how it got going. So these elements contribute to that demonstration of disparate impact. But they must, too, as an aggregate have disparate impact. There's no question.

Mr. **Fawell**. They must cause it. My only point, and perhaps we don't differ, is that, then, we ought to make this abundantly clear that when you do, by discovery, obtain records or information which gives any reasonable person knowledge of what the employment practices are which caused the disparate impact, you then indeed have the burden of showing the cause, the proximate relationship.

Mr. **Kimerling**. You have to show that——

Mr. **Fawell**. And that you're not just simply relaxed by saying, well it's a two percent contribution to the disparate impact.

Mr. **Kimerling**. Well, it is. In this setting, if you have more than one practice, all of them contribute to the disparate impact.

Mr. **Fawell**. I don't argue that. But the words——

Mr. **Kimerling**. But that's what we're contributing there. It's so that if you can't segregate out, as the Justice Department has tried to do in litigation subsequent to *Wards Cove*, and say, "Show me that this is the element," it's just for that purpose that you can't show that one question or one element on the physical is the whole problem.

So I think that the beginning of your hypothetical makes no sense. If an employer has records, the burden is on the plaintiff. Mr. Dichter has studiously avoided answering a question about whether or not the standard in this act, H.R. 1, is a standard that he believes is at the point at which employers are going to adopt quotas.

I think his position is that there's a continuum—he's been asked by the chairman, by Representative Washington, to look at this act and say whether these words are a necessary burden. And I would press this committee to press employers to say so. These are the words, almost identically, that the President wrote in his veto message.

If they're suggesting that this is too much, they're suggesting that the President of the United States wanted a bill that was too difficult for employers so that they would adopt quotas.

Mr. **Fawell**. May I suggest that these are not similar to the bill that was——

Mr. **Kimerling**. Well, I tell you, if you can tell me the difference, I'd appreciate it. Other than the fact than the employer chooses which standard——

Mr. **Fawell**. Which use the word "contributed"——

Mr. **Kimerling**. [continuing] but significantly contributed to successful job performance is the words that the President chose. So if you can continue to say that this is going to do it, then you're continuing to say that what the President wanted to do was going to bring about quotas.

Mr. **Fawell**. Well, I respectfully disagree with your comments.

Mr. **Kimerling**. And lastly, as to whether or not there are alternative procedures, Congressman, the Uniform Guidelines require employers to consider alternative procedures. It's a element of the Guidelines that are already in practice, as Mr. Rose has already pointed out.

Mr. **Fawell**. But it doesn't nullify the cause of action and find the man guilty. It is evidence that can be utilized in determining whether or not there's a business necessity valid defense. It doesn't, as in this bill, just nullify the defense.

Mr. **Kimerling**. You just exactly said what it is. It shows that it's not a business necessity, that there's an alternative procedure that can do it.

Mr. **Fawell**. It finds the man guilty; whereas before, as the gentleman from Texas indicates, it's evidence of pretext. And perhaps it gets us toward the intentional——

Mr. **Kimerling**. Mr. Dichter's words suggested that, and I suggest to you that if you'd rather have an employer found guilty of just pretext, which is the code word for intentional discrimination, then maybe we can talk about that. But what it does is say that it's a violation of the Act. It doesn't describe the remedy; that's for sure. But it doesn't describe the violation of the act because it eliminates this practice, the one that's being challenged, as a business necessity. Because there's a less discriminatory alternative.

Mr. **Fawell**. May I conclude that it eliminates the defense. In *Albemarle*, the case that is important in this area, never did that. I'd appreciate, Mr. Dichter, does this not destroy the defense ipso facto if they just put evidence into this regard?

Mr. **Dichter**. I think the way it is worded it is not merely a question of requiring the employer to adopt it. But they could be found liable for engaging in disparate impact discrimination with all of the monetary remedies attendant to that, without any proof that they even knew about the practice at all.

Mr. **Fawell**. Okay.

Chairman **Ford**. Mr. Rose.

Mr. **Rose**. I would like to attempt to respond further to the Congressman from Illinois. One is that the word "contribute" in the statute is intended to mean it causes a part of the discriminatory impact, not necessarily all of it. So it seems to me that if you're uncomfortable with the word "contribute," you might want to think about "causes in part."

Mr. **Fawell**. Yes, I would agree with that.

Mr. **Rose**. But I think that it doesn't mean that there's just some kind of a whiff if the employee would have to show that there is a causal relationship. Even though it doesn't cause all of the discrimination, it causes a significant part of it. And that's the way the law has been under *Griggs* since *Griggs* was adopted.

Let me say the second thing, and this is why in the 18 years that *Griggs* was the law so few small employers were sued under the disparate impact branch of Title VII. And that is in order to show that there is disparate impact, you need substantial numbers of employees, or at least applicants for employment. The way statistics work, you can't show that something has a disparate impact unless you have what the psychologists call a big N. You have to have a substantial number of people.

Therefore, one or two isolated hirings, or even ten or fifteen isolated hirings are not going to give rise to the disparate impact branch of Title VII. It's just the way statistics work, unless the employer bought the Wonderluck test, as to which there's evidence of national discriminatory effect through that test.

But for most kinds of subjective practices, the small employer's not involved at all because there aren't a large enough number of applicants who have been screened out or not hired.

The USX case that Mr. Dichter made reference to where the Third Circuit supported a finding of unintentional discrimination even after *Wards Cove* was a case in which foremen hired hundreds and hundreds of people. And if you looked at that statistically and compared those who were hired to those who applied, there was a huge difference in the applicant success rate. And the difference went against blacks.

And all they had to say for it was their own self-serving testimony that they thought they were hiring the best guy. The problem with interviews is that interviews tend to reinforce the preconceptions of the interviewer. Unfortunately, many interviewers still have preconceptions based on race and sex and national origin that may be entirely unconscious.

This Congress, in 1972 when it passed the Equal Employment Opportunity Act of 1972 ratified *Griggs* by citing it with approval. Everybody cited it with approval. And the desire of Congress was to extend *Griggs* to State and local governments. This Congress stated that it was trying to get at the preconceptions, frequently unconscious, of first line supervisors and other interviewers, as well as purposeful discrimination.

Mr. FAWELL. Should we eliminate interviews altogether? Is that the answer?

Mr. ROSE. Sir?

Mr. FAWELL. A man whose breath is in his nostrils, I guess, will make errors. You don't like interviews at all?

Mr. ROSE. No. Obviously, most interviews are fine and most interviews do not result in adverse impact.

Mr. FAWELL. But because there are a few—you're not suggesting that we just get rid of interviews or other subjective methods?

Mr. ROSE. No. What I'm saying is that the Congress, when it passed the 1964 Act, was very familiar with the use of subjective standards by voting examiners in the south. And certainly, in 1964 if you look at the legislative history of the 1964 Act, you will not see a great preference for objective procedures or subjective ones. And I'm not saying that one is better than the other. I think my psychologist friends will say that there are studies to show that the interview system usually does not prove to be valid, but the objective evidence does.

Mr. FAWELL. May I just make this comment? I somehow, and I could be wrong as beans on this, but I have the feeling that until the industrial psychologists have everything down to a scientific certainty and there's an attorney there to advise the employer, you're never going to be happy. But in the process I think we ought to look at all the people who are qualified, white and black, men and women, all religions, who are qualified, people who do everything right, who get the education, strive and do everything that can be measured only by subjective standards.

And they're the ones who, basically, are left out by what we're trying to do here. We're trying to get a standard developed in such a way that we're going to have scientific certainty and a test for everything, I suppose. And in the final analysis, there are an awful lot of people here you just kind of eliminate from the process altogether. We can't even make inquiries about scholastic achievements, records, things of this sort.

Mr. ROSE. Nobody has recommended that, sir. And it's not in this bill at all.

Mr. FAWELL. I don't know many—if you get some tight definitions here, I don't know how many employers are going to take risks on doing anything but having the simplest and scientific tests so they can have their defense, in part, with their psychologist as the expert witness.

Mr. ROSE. It didn't happen in 18 years of *Griggs*. And if the purpose of this committee is to restore *Griggs*, and that's certainly my purpose and recommendation and I urge it on you, simply to restore *Griggs*, not make it any tougher, not make it any looser, simply to restore *Griggs*, you'll have done a great job and the bill will be an enormously important bill.

Exactly how that should be worded is, of course, a matter on which reasonable people can disagree. And I really don't suggest anything to the contrary.

Mr. FAWELL. Perhaps we can just make that suggestion and forget about all the other——

Mr. ROSE. Well, it's in the bill now. All language is susceptible to more than one construction. But in reading it in a way that's most difficult for the employer, I think you miss the bill as it's written, the overriding, clear purpose of the bill is simply to repeal *Wards Cove* and to restore *Griggs*.

And I think with that context, all the different languages should be read to refer back to the body of law that evolved under *Griggs*. And if you do that, a lot of the concerns, both by the employers and by the applicants or employees, will be washed away because you've got a body of law. It doesn't include everything; of course it doesn't. And, of course, the courts are going to have to interpret it in the future.

Mr. FAWELL. And I might add the Supreme Court is not of the opinion that they did anything bad to *Griggs*. And so if you have that, they would probably come right back up to *Wards Cove* again. They construe *Wards Cove* as being based upon and a logical part of *Griggs*.

Mr. ROSE. I think that the lower courts and the commentators were unanimous in viewing *Wards Cove* as a departure. As I say, I quoted Judge Posner for the Seventh Circuit, but I have been before probably five or six Federal judges in the last two years. There is not one of them that expressed the view that *Wards Cove* was an adherence to *Griggs*. They all viewed it as a major departure and every court of appeals whose opinion I have read has viewed it as a major departure.

And if, in fact, simply restoring *Griggs* does get us back to what *Griggs* really was, I have confidence that if the Congress passes a bill that says, "We are restoring *Griggs*. We're codifying *Griggs*, and we're overturning *Wards Cove*," that the courts will carry that out, maybe not to my satisfaction in any case, maybe not to anybody's satisfaction in every case.

But the courts will try and do the job that they do traditionally, and do well, which is to apply the law that this Congress enacts. And I think that should be the major objective. I think there is wide room for disagreement. But I think if you keep that major objective in mind and you keep it in the bill, then I think you've gone a long way to doing what's necessary.

Chairman FORD. Mr. Rose and other members of the panel, it's my impression from the standpoint of looking at this as a lawyer that when the court is coming out with what seemed to be slightly different interpretations of the law, they're not dealing with common law standards. And they're not dealing with raw constitutional standards. They're dealing with a statute that we passed for a specific purpose, and they're interpreting that statute.

So if they interpret the statute and we then come back very deliberately saying, "You didn't interpret it the way we, the lawmaking body of this government, intended; therefore, you will in the future interpret it as you did at the time of *Griggs*," there isn't any wiggle room for a court because of its philosophical makeup or anything else to do something else, is there?

Mr. ROSE. Mr. Chairman, the courts have great authority and there's great wiggle room, so I wouldn't say there isn't any wiggle room. But I'm saying that if you do that, you've done what you can, and I think the system will work. I'm not saying that I'd be satisfied with every case or that anybody——

Chairman FORD. The court wouldn't be likely to write an elongated opinion saying, "Notwithstanding the clear expression of intent by the Congress, we're going to do something else."

Mr. ROSE. I don't think so. On the contrary. The one instance that I know of where the Congress did it was the Pregnancy Discrimination Act. I think it was 1978. I'm not sure what year. It overturned *Gilbert* and did it fairly clearly. The Supreme Court has faithfully adhered to the new definition that the Congress adopted. And I see no reason to believe that if you did the same sort of thing here you wouldn't get restoration of *Griggs* if that's the intent of the Congress.

Chairman FORD. Do you agree with that, Mr. Dichter?

Mr. DICHTER. I agree with that if that was all that was in here dealing with *Wards Cove*. The problem is that this bill goes further than that. It isn't limited to the phrase that simply says we're restoring *Griggs*. It then goes on to add things which we contend are not consistent with *Griggs*.

Chairman FORD. But you have any question about what our clear intent is in writing this language?

Mr. DICHTER. If that was the only intent, then you would eliminate everything else in this bill other than that one paragraph.

Chairman **Ford**. I'm not asking you to comment on the wisdom of our intent. I'm asking whether you have any difficulty understanding what we intend to do.

Mr. **Dichter**. Well, but you haven't done that, because you have done more than that because that doesn't say that this law shall not be construed to go any further than *Griggs*. It simply says that was our intent. But then it adds very specific requirements and sets some very specific standards. If those are different than *Griggs*, I suggest the courts are bound to follow what you've said in this statute, and not what they think they said in *Griggs*.

So if you limit it to just to that one paragraph and said all we want to do is go back to *Griggs*, and you've dealt with *Griggs* for 18 years, that's fine. We're not going to tell you what we think *Griggs* means. But you're not doing that. You're setting up new standards. And whether the court thinks that was what *Griggs* said or not, you've not told them what the standard has to be.

Chairman **Ford**. Doesn't the court per force, when we say that in that one simple provision that you talk about, have to interpret all these other words that seem to bother you in the light of *Griggs*, not in the light of anything other than *Griggs*?

Mr. **Dichter**. I think that what they would have to say is you wrote all those other words because you intended to do something more than simply refer back to *Griggs*.

Chairman **Ford**. Would you be happy if we said specifically in the report accompanying this bill that we didn't intend anything that isn't in the explicit language, and we specifically were warned by Mark Dichter that somebody might be confused, and we did not, of course, intend to do that?

Mr. **Dichter**. I think a court would still say that why did you write all these other words if all you intended to do was pass that one paragraph.

Chairman **Ford**. Just to make their jobs interesting.

I want to thank the panel. It's been a long day for you and I appreciate—oh, do you have any more questions?

Mr. **Washington**. Yes, sir.

Chairman **Ford**. Mr. Washington.

Mr. **Washington**. Thank you, Mr. Chairman.

Just following up on the point the Chairman made specifically to the lawyers and to all of you. The point the Chairman makes is, I think, very poignant, and I'd like to get your thoughts on it.

In light of *Wards Cove*, but reading, if you go back before *Wards Cove* a little bit to *Watson* v. *Fort Worth Bank and Trust*, it seems to me that, first of all, the question is do you believe that the Supreme Court could have decided *Wards Cove* v. *Antonio* without all of the language which really amounts to obiter dictum, except I don't think there's any such thing as obiter dictum in a United States Supreme Court opinion.

They went beyond what was necessary in order to reach the result in that case. And I take that along with *Watson*, which kind of set us up and let us know that that was coming before we got to the decision in *Wards Cove*.

For that reason, don't we then come back to the Chairman's question that we need to make a clear, concise, direct statement, not so much in terms of definitions, but to bridge the gap on what the Congress, for whatever reason, failed to do in the ensuing period between the time that *Griggs* was decided and the time that *Watson* was decided to make it clear on exactly what the congressional intent is on how we wish the statute to be interpreted.

And ought not we do that regardless of whatever else we put in the bill in light of the fact that by deciding *Watson* and by deciding *Wards Cove*, the court has indicated a desire, or willingness or at least an amount of desire on its part, to act when Congress fails to act. And there were some areas that needed more definitional intent from the Congress, and in light of the fact that Congress had failed to come forward.

And I'm not suggesting that's the reason why they decided *Watson*. But *Watson* was riding on a clear slate, so to speak. And then you set *Watson* up and the Congress does nothing in response to that, and you come along with *Wards Cove* behind it. It seems like, to me, that in an indirect, left-handed way, so to speak, the court was asking the Congress to give us more parameters on what you mean by not only the specific, black letter law of what you set out in the 1964 Civil Rights Act, but you have not responded to these interpretations that we made in the ensuing period.

Mr. DICHTER. I agree with what you said up until that last point. I think that *Watson's* a good example of as the court took the principles that were established in *Griggs*, which were applied to basically unskilled jobs and very discrete requirements. And then it attempted to apply those to subjective criteria, to groups of tests. They found that the words they used before may not have been appropriate.

Mr. WASHINGTON. Exactly.

Mr. DICHTER. And that was my point before. That if we're going to get into legislating it and trying to find words, then we do have a broad spectrum. And you do have to look at all the various applications of those words. Or you go back to *Griggs* and say we'll let the court continue to evolve that process. But I don't think you do both. I mean, I don't think you can say you're doing both.

Mr. KIMERLING. I think that Congress has in the past, and should continue, to do both. Obviously this Congress has on numerous occasions, unfortunately, had to restore the Civil Rights Acts in light of a subsequent decision. We had the *Grove City* reversal under Title IX. We had the Voting Rights Act reversals that this Congress had to do and straighten out the Supreme Court about what the purpose and intent of this legislation was and the Pregnancy Act legislation.

I think in each of those instances, it gave language as well as to say, either in the statute or in the legislative history in most instances that it was reversing what the court had done in those cases. I think it's absolutely necessary and appropriate to do both. I think that the court needs that guidance. It will find, unfortunately, ways to avoid the law on civil rights. As Justice Blackman said in his dissent in *Wards Cove*, he thinks that the majority has forgotten that discrimination exists or discrimination against nonwhites ever did exist.

And I think that that is absolutely clear based on what they've done in the last three or four years. And this Congress has got to be equally firm in its commitment to civil rights and make a very clear declaration of what the law is, as well as indicate to the court that it's going way off base in reading these acts in a way that is contrary to the purposes of the act and contrary to civil rights generally.

Mr. DICHTER. Mr. Chairman, may I have just one minute to respond to a reference made to me in last week's testimony by Ms. Ezold?

Chairman FORD. Comments made to you?

Mr. DICHTER. She commented—yes.

Chairman FORD. Why would she mention you?

Mr. DICHTER. Well, because she mentioned the counsel for the law firm that she has sued, and I'm the counsel for the law firm that she has sued.

Chairman FORD. One minute is hardly adequate, but go ahead and defend yourself.

Mr. DICHTER. Thank you. She said that I was quoted in the press as saying that her remedies might be limited in that case; and therefore, she was suggesting that Title VII remedies might be inadequate. The extent to which her remedies might be limited, which is an issue pending before the court, is not because of Title VII. It's because of a separate finding by the court that she wasn't constructively discharged, that she voluntarily quit her job and wasn't compelled to quit her job.

And our whole argument about the remedy being limited is not because of Title VII, but because of that separate finding by the court. And therefore, I don't think it supports her claim of Title VII remedies being applicable.

Chairman FORD. I tell you, you tempt me sorely, but I've been around here long enough to know that if we go any further with this, we're going to mess up somebody's law suit someplace. So I'd rather not even react to that. Mr. Schneider.

Mr. SCHNEIDER. Yes. The high-paid industrial psychologist would like to end with a note that we, the American Psychological Association, representing the persons who typically are involved in the development of these personnel selection procedures we are discussing, strongly urge the committee to consider language that encourages job relatedness without the word "significant" because it is interpretable as statistically significant and therefore limiting.

And further, that numerous kinds of work behaviors be included in the definition of business necessity, not just job performance. Thank you.

Chairman FORD. I thank you, and I think Mr. Rose has already given us some wise advice. I doubt very much that the National Association of Manufacturers or the Chamber are ever going to come in and endorse anything with a title like this no matter what we wrote into it. But at least some employers might feel a little easier if their consultants were telling them that this was livable language. And we want peace, not war.

Thank you very much to all of you for your cooperation with the committee and for your patience at staying here this long. We have one more witness, Professor John Bishop of Cornell University in New York School of Industrial and Labor Relations at Ithaca.

Professor Bishop, your statement will be printed in the record in full at this point. You may proceed.

STATEMENT OF PROFESSOR JOHN BISHOP, SCHOOL OF INDUSTRIAL RELATIONS, CORNELL UNIVERSITY, ITHACA, NY

Mr. Bishop. Thank you, Mr. Chairman.

I'm an associate professor of economics at the New York State School of Industrial and Labor Relations at Cornell University. It's a great honor to be asked to testify before you today.

My purpose is to point out some unintended consequences of H.R. 1. I predict that if passed as is, without change, it will make it more difficult to achieve the education goals set forth by the National Governors Association, the President, and leadership of the House and Senate.

And since this, probably—I think I need to give you some background on the nature of our problem in education and its causes, in order to layout the argument as to why policies regarding selection policies at firms are critical to reforming education.

As you all know, American students do very poorly when measured to their counterparts abroad. In mathematics, the gap between Japanese and finish high school seniors, for example, and their white American counterparts is about twice the sizes of the two or three grade equivalent gap between blacks and whites.

If our children are to be better educated, everyone in our society must give higher priority to learning; students, parents, teachers, school administrators, school boards, and also the education and labor committees of the House and Senate.

Now, the nature of the problem is pervasive. Right now, a typical junior high school student does 3.2 hours of homework, in Japan, a junior high school student is doing 16 hours of homework a week. Parents must tell their children to turn the TV off and do homework. Right now, American students in high school spend 19.6 hours watching TV, while students in Austria and Norway spend only 6 hours, in Finland, 9 hours, in Canada, 11 hours.

Students must take to choose rigorous math and science courses, yet for the high school graduating class of 1982, only 40 percent took algebra, only 40 percent took chemistry, and only 20 percent took physics. In Canada, 25 percent of the age cohort of all 18 years old are studying science at a difficulty level that is comparable to the advance placement program in the U.S.

Advance placement is, in science, something that less than 1 percent of our students do. School boards must raise the salaries of teachers. Despite the fact that overall living standards are higher in the U.S., total compensation, adjusting for cost of living differentials is 24 percent higher in Canada, 6 percent higher in Netherlands, 20 percent higher in Belgium, and 28 percent higher in France.

Now, the questions that these statistics raise are the following: why do American voters choose to pay teachers so little? Why do students avoid tough courses? Why do American parents hold their children in schools to lower academic standards than parents in other countries?

My thesis is that the fundamental cause of all these problems is the lack of economic rewards for hard study and learning in high school. Only 20 to 23 percent of tenth graders believe that biology, chemistry, physics or geometry are needed to qualify for their first choice occupation. And that is despite the fact that 75 percent of them are planning to go to college. Their perception of the labor market is correct. The American labor market fails to reward effort and achievement in high school.

In studies that I've done and others have done, we've found that during the first ten years after leaving high school, greater competence in science, language arts, and mathematical reasoning, lowers the wages of males, and increases their unemployment.

For young women, verbal and scientific competencies have no effect on wage rates and a one grade level increase in mathematical reasoning competent raise wage rates by a measly one-half of 1 percent. Four-fifths of high school graduates that are hired by small and medium sized firms were not asked to provide a transcript or even to provide information on their grades in high school.

Only 3 percent were asked to take a test assessing their competence in reading or mathematics. One of the saddest consequences of the lack of signals of achievement in high schools is that American employers with good jobs offering training and job security are unwilling to take the risk of hiring a recent high school graduate. They instead prefer people with experience.

Their view of 18-year-olds was expressed by a supervisor at New York Life Insurance, a company, by the way, that has been moving some of its claims processing work to Ireland, who commented on television, "When kids come out of high school, they think the world owes them a living." Surely this generalization does not apply to every graduate, but students who are disciplined and academically well prepared currently have no way of signaling this fact to employers.

Now, educational leaders, realizing this problem, are calling for the labor market to reward learning in school. They're expecting that once the labor market and employers start doing that, the students will start studying harder, and local voters will be more willing to raise taxes to improve the schools. Al Shankar, for example, has asked businessmen, and I quote him, "Provide clear and early rewards for those students who work hard and learn the most."

The Secretary of Labor's Commission on Workforce Quality and Labor Market Efficiency proposed, about a year and a half ago: "The business community should show, through their hiring and promotion decisions that academic achievements will be rewarded," and I just quoted them.

A second quote, "Schools should develop easily understood transcripts which at the request of students are readily available to employers." Now, it is important that the measure that we use of academic achievement be of a particular type. We should not use rank in class or grades, measuring performance relative to others in the classroom as our signal of student accomplishment, at least not the sole one.

The reason is because this leads students to pressure each other, not to study. You don't want to be called a geek or a nerd in high school. Competency should be defined by an absolute standard in the way that Scout merits badges are. Different types and levels of competency need to be certified. Measurement of students accomplishment must be fair across schools so that schools can be held accountable for the achievement of their students.

We are the only industrialized country in the world that does not have a system providing externally graded competency assessment keyed to the secondary school curriculum. While the Japanese use multiple-choice exams, all other nations use extended answer examinations in which students write essays, show their work for mathematics problems, and so forth.

These exam grades are included on resumes and are part of job applications. In fact, in the prepared remarks, I have two examples of a resume of a girl, of a woman looking for a job as a clerical worker in Ireland, and then a college graduate looking for a job in the U.K. Both of them have put down the grades they got on their exams at the end of high school.

Parents in these countries know that a child's future depends critically on how much is learned in secondary school. As a result, parents, in most other Western nations, are willing to pay more for, and get more from their local schools than we do.

Now, how does this relate to civil rights law? Employers are enthusiastic about the reform agenda I have just described, and there are a number of pilot efforts underway around the country to implement improved signaling of accomplishments in high school to the labor market. But when you ask them individually to give greater weight to academic achievement in their own hiring, they say that we'll need to talk to their lawyer first.

The threat of litigation brought under the 1971 *Griggs* interpretation of Title VII deterred most employers from using tests measuring competence in reading and mathematics, and I think also reduced the use of grades in school. Only 14 percent of employers ask about grades on a job application. This is one of the important reasons why youth don't receive significantly higher wage rates when they learn more English, science, and mathematics in high school in this country.

This is something that does not occur in other countries, where you find very strong relationships, because there is a very good signal of this performance, and employers are using it for hiring decisions. Recent court decisions, and I'm referring to here, not just *Wards Cove*, but also circuit court decisions supporting validity generalization used in these kinds of cases, have made it easier to defend the use of such tests as part of a selection process, and we can expect that the payoff to learning will increase over time as a consequence.

But I'll tell you, I've talked to many employers, and they're still very, very fearful of moving this down this path and are spending, in many cases, the larger companies I'm familiar with are spending huge amounts of money to do studies to justify or as a precaution to defend against a potential suit, even though with validity generalization they really don't need to do that kind of research in their own firm.

If, however, the language contained in the civil rights bill vetoed by President Bush becomes law, I fear that the legal impediments, the use of high school grades, and scores on basic skills tests of measuring how well you read or do mathematics, and poor hiring decisions will probably grow, and the payoff to learning will not increase.

And I think that if we are to get the society to place higher priority on education, spend more money on it, and improve the quality of our schools, we need to increase the rewards that students receive when they come out with high quality education.

I said I fear this will be the outcome, because there does not appear to be any consensus regarding the impact of this legislation. And I'm not a lawyer, and so I cannot engage in an argument about what is going to be the effect of this legislation, in terms of what will win in a court or not, but what I can tell you is I am an economist, and when something becomes more expensive, you do less of it.

And heavy amounts of legal litigation threatened around some activity, such as use of the Wonderluck test or some test of basic skills such as reading and writing and mathematics. There's a fear that I may be taken to court as a result of using a reading test for selection. You can be sure that's going to reduce the number of companies that choose to do that, and it has reduced it to the level of 3 percent for small and medium sizes companies.

I'm, therefore, here to ask for clarification from the Chair, and from the sponsors of the bill to tell me about some specific cases, and a comment of within of the congressmen about the Persian Gulf led me to bring this up. The Armed Forces of the United States use the Armed Services Vocational Aptitude Battery to select and assign recruits to occupational specialties.

There's no organization in the world that uses employment testing as extensively as the U.S. Armed Forces. It's testing program in fact costs, the research, just the research to figure out how to do of testing best, cost, in one recent contract, $100 million to pay for the research necessary to improve the test. This testing program is one of the major reasons why our troops exhibited such professionalism in the Persian Gulf. The military makes absolutely no adjustment in scores based upon rates, and yet, more than 30 percent of the soldiers are members of minority groups and the organization's chief executive officers, as well.

Now, the question I'd like to ask is can a private firm use this research to justify its selection of tests? One of the findings of the military research is, and that's unique to that research is that a test of geometry and algebra that they use as one of the components of the ASVAB is just about the single best predictor of job performance in a whole pile of jobs, and if it's not the first best, after a technical test, it's second best exam. It beats out an arithmetic reasoning test, and it also beats out an arithmetic computation, and it beats out a verbal test, too.

And yet, we don't see very much use of such algebra and geometry tests in selection in the private sector. Could a company, based upon the fact that their jobs are similar to the maintenance jobs that the military was selecting people for, use a test of algebra and geometry for selection? Question No. 1. Question No. 2, school districts are currently developing business transcripts and computerized referral systems to help their students get jobs. Would employers be able to ask for referrals from such systems, must such systems use within group scoring or some other technique to reduce disparate impact?

Another question: Many fast food companies ask for high school grade point averages on their job applications. Now, let assume that these have disparate impact. Is this a permissible practice or a business necessity for a job like sweeping the floor in a McDonalds, or flipping hamburgers in a McDonalds?

It may have some nice incentive effects because it's right then and there, while you're in high school, that getting the McDonalds job is being influenced by your grades in high school, and so it has some nice incentive effects, but can it be justified by an industrial psychologist?

Another possibility is that a company is introducing new techniques and new approaches. In fact, many companies I'm familiar with have gone to total quality control. And one of the things that some of these companies have done is they've tested their people and found that a whole bunch of people that they currently have employed do not rate at the ninth grade level. So they've set up educational programs to help them improve, but they've also salvaged this as the cutoff point for new hires.

They want people to be able to read and do mathematics at this level. Are they going to get in trouble? What kind of evidence do they need? I fear the answer is going to be we'll have to see how the courts interpret the law. If that's indeed the answer, I think we all know how most companies are going to behave, particularly small companies. *Griggs* almost completely eliminated employment testing for ten years, and it started to be instituted more recently as opinions within the psychology profession changed regarding the validity generalization and as other kinds of evidence as to fairness of these tests became available.

This trend was underway before *Wards Cove*. In fact, I have not seen any company react yet to *Wards Cove*, because they're thinking that it may not very well last for very long. Firms will probably not take the risk of using a selection technique that is such a red flag to potential litigators, and if they do, they will certainly not announce it to the world.

And this is an important point because what we want is employers to advertise the fact that they're using performance in school as a selection device. And yet, because it's likely to have this disparate impact, the NAEP data, for example, indicates that while the gap between black and white reading and math capability at the end of high school is falling, it used to be four and a half grade level equivalents, it's now down to two and a half or so grade level equivalents.

So it's been falling over the last 15 or 20 years. It's still there. And in addition, you have a large group of adults out in the labor market for whom a four grade level equivalents is what we're talking about, in terms of the average differences between whites and blacks out in the population.

So, consequently, tests of these kinds are likely to have disparate impact as a whole in a lot of jobs, even if, in particular cases like the U.S. military they don't. The company is likely, I would predict, to maybe use a test or maybe use grades in high school or what courses somebody took in high school as a selection device, but they're not going to be advertising it to draw attention to themselves and potentially create some litigation.

But in order for this policy to work, we must ask the employers to go to schools and tell the students that this is what they're doing, and that we want you to study hard in order to have a better chance of getting a chance at our company, our company offering better jobs than some other company which may not be doing this.

This is another reason why employers need to be told by people in authority that they are acting in the National interest when they seek out and reward those who have high level academic skills. I hope, therefore, that you'll consider putting into the legislation some language that makes absolutely clear that employers can, at least for recent school years, take economic accomplishment into account when they make hiring selections, and that they do not have to conduct expensive studies in their own company to justify such practices.

And I provide you with some suggestive language, but while I did go to some lawyers to get help on that language, I don't stand behind it. I also threw in a whole bunch of limitations so that those who have been supporting H.R. 1 would not be giving away the store on these kinds of tests for all workers, so that is it's limited to workers who have been out school recently, and it's also limited to jobs that pay at least 50 percent above the minimum wage.

So that's all the thoughts that I have, but I think it's important—I mean, I'm hoping that, congressmen in Washington, that you will give me some assurances that my fears are incorrect. That in fact, all of these proposed uses that I have described would in fact be permissible in this legislation, and if in fact I can be confident that's in the legislative history, I'd go home happy.

[The prepared statement of Professor John Bishop follows:]

SIGNALLING ACADEMIC ACHIEVEMENT TO THE LABOR MARKET: THE LYNCH PIN OF AN EDUCATIONAL REFORM STRATEGY COULD CIVIL RIGHTS LEGISLATION BECOME A BARRIER TO IMPROVING EDUCATIONAL ACHIEVEMENT

Testimony before the House Education Labor Committee Hearing on H.R. 1.
March 5, 1991

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> The high school graduates of 1980 knew about 1.25 grade level equivalents less math, science, history and English than the graduates of 1967. This decline in the academic achievement lowered the nation's productivity by $86 billion in 1987 and will lower it by more than $200 billion annually in the year 2010 (Bishop 1989).
>
> Between 1971 and 1988 real wages fell 17.3% for young male high school graduates and 10% for young female graduates. (Katz and Murphy 1989)
>
> 93 % of 17 year olds do not have "the capacity to apply mathematical operations in a variety of problem settings." (National Assessment of Educational Progress, 1988b p. 42)
>
> 25 % of the Canadian 18 year olds studying chemistry know as much chemistry as the top 1 % of American high school graduates taking their second year of chemistry, most of whom are in Advanced Placement classes (International Association for the Evaluation of Educational Achievement, 1988).

While many affluant parents believe that their children are doing acceptably in school by international standards, this is not the case. In a 1986 study of 5th grade math achievement conducted by Stevenson, Lee and Stigler, the best of the 20 classrooms sampled in Minneapolis was outstripped by every single classroom studied in Sendai, Japan and by 19 of the 20 classrooms studied in Taipeh, Taiwan. The nation's top high school students rank far behind much less elite samples of students in other countries. In mathematics the gap between Japanese and Finnish high school seniors and their white American counterparts is about twice the size of the two to three grade level equivalent gap between blacks and whites in the US (NAEP 1988b; IAEEA 1987). The learning deficit is pervasive.

Quality education can not be imposed from Washington D.C. Neither can it be imposed by Albany or Sacremento. The American education system is too decentralized for top down reform to work. If our children are to be better educated, everyone must start giving higher priority to learning: students, parents, teachers, school administrators, school boards and, I might add, the Education Committees of the House and Senate.

Students must do more homework--right now junior high school students in the US devote only 3.2 hours a week on homework, Japanese devote 16.2 hours a week.

Parents must tell their child: "turn off the TV and do your homework"--Right now American students spend 19.6 hours a week watching TV while students spend only 6.3 hours in Austria, 9.0 in Finland, 5.9 in Norway and 10.9 in Canada.

Teachers must assign novels as homework and the assignments must be completed--Yet in many schools "Students were given class time to read The Scarlet Letter, The Red Badge of Courage, Huckleberry Finn, and The Great Gatsby because many would not read the books if they were assigned as homework. Parents had complained that such homework was excessive. Pressure from them might even bring the teaching of the books to a halt. (Powell, Farrar and Cohen 1985, p.81)." Americans students spend only 1.4 hours a week reading; Austrians 4.9 hrs/wk, Finns 6.0 hrs/wk, Norwegian students 4.3 hrs/wk.

Students must pay attention in class and be engaged in learning--Yet, in a Chicago study, public schools with high-achieving students averaged about 75 % of class time for actual instruction; for schools with low achieving students, the average was 51 % of class time (Frederick, 1977). American students average nearly 20 absences a year, Japanese students only 3 a year (Berlin and Sum 1988). Overall, Frederick, Walberg and Rasher (1979) estimated 46.5 percent of the potential learning time was lost due to absence, lateness, and inattention.

Students and their parents must choose to take rigorous math and science courses. Yet the high school graduating class of 1982 took an average of only .43 credits of Algebra II, .31 credits of more advanced mathematics courses, .40 credits of chemistry and .19 credits of physics (Meyer 1988 Table A.2). Fewer than 1 % of American high school students take Advanced Placement (AP) Chemistry or AP Physics and only 2.3 % took the AP calculus exam. In Canada 25 percent of all 18 year olds are studying science at a level difficulty that is comparable to AP in the US. In Japan seniors in voc/tech high schools take calculus.

School Boards must be willing to raise local taxes so they can offer better salaries and attract better teachers to their community. Despite the fact that overall standards of living are higher in the US, total compensation (adjusted for cost of living differentials) of teachers in 1982-84 was 24 percent higher in Canada, 7 percent higher in Germany, 6 percent higher

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in Netherlands, 24 percent higher in Sweden, 20 percent higher in Belgium and 28 percent higher in France.[1]

Parents must demand higher standards at their local school--Yet despite the fact that their 5th graders were far behind their Taiwanese and Japanese counterparts in mathematics, when asked "How good a job would you say ___'s school is doing this year educating___", 91 percent of American mothers responded "excellent" or "good" while only 42 percent of Taiwanese and 39 percent of Japanese parents were this positive (Stevenson, Lee and Stigler 1986).

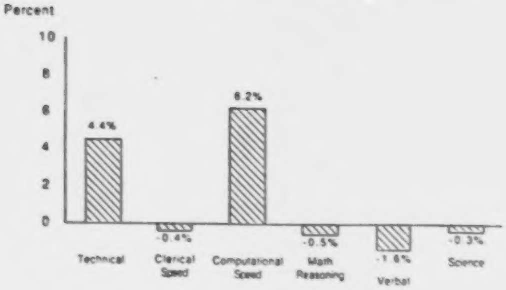
The question that is raised by statistics such as these is "Why do American voters choose to pay teachers so little?" Why do voters not demand higher standards of academic achievement at local schools? Why do school boards allocate scarce education dollars to interscholastic athletics and the band rather than better mathematics teachers and science laboratories? Why do students avoid difficult courses? Why do American parents hold their children and schools to lower academic standards than parents in other countries?

The fundamental cause of all of the above problems is the **LACK OF ECONOMIC REWARDS FOR HARD STUDY AND LEARNING. Only 20-23 % of 10th graders believe that biology, chemistry, physics or geometry is needed to qualify for their first choice occupation (LSAY, 1988, BA24B-BA25D).** Their perception of the labor market is correct. **The American labor market fails to reward effort and achievement in high school. Analysis of the Youth Cohort of the National Longitudinal Survey indicates that during the first 10 years after leaving high school, greater competence in science, language arts and mathematical reasoning lowers wages and increases the unemployment of young men. For young women, verbal and scientific competencies have no effect on wage rates and a one grade level increase in mathematical reasoning competence raises wage rates by only one-half of one percent** (Bishop
(S'ed.qual 1-2)
1988b). Four-fifths of the high school graduates hired by small and medium sized employers were not asked to provide a transcript or even provide information on their grades in high schools. Only 3 percent were asked to take a test assessing their competence in reading or in mathematics.

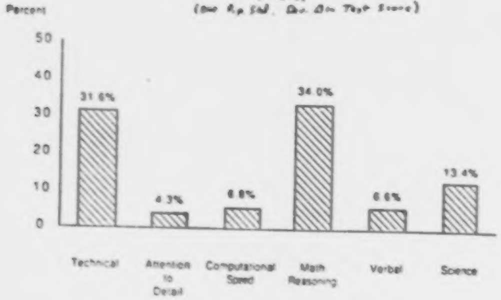
Although the economic benefits of greater academic achievement to the employee are quite modest, the benefits to the employer (and therefore, to national production) are immediately realized in higher productivity. Over the last 80 years, industrial psychologists have conducted hundreds of studies, involving hundreds of thousands of workers, on the relationship between productivity in particular jobs and various predictors of that productivity. They have found that competence in reading, mathematics, science and problem solving are strongly related to productivity in almost all of the civilian and military jobs studied.

One of the saddest consequences of the lack of signals of achievement in high schools is

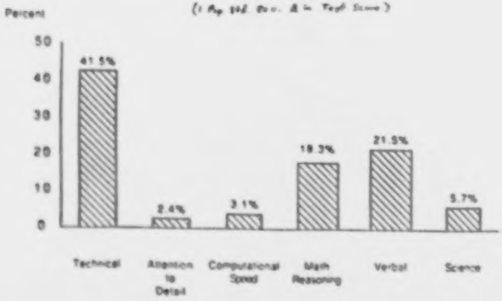
Effect of Competencies on
Wage Rates of Males
(1 Pop. Std. Deviation Δ in Test Score)



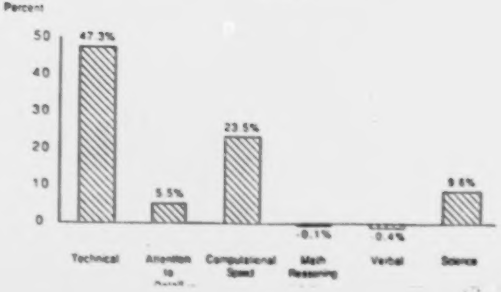
Effect of Competencies on
Work Sample Job Performance Measure
General Maintenance Jobs
(N=379)
(One Pop. Std. Dev. Δ in Test Score)

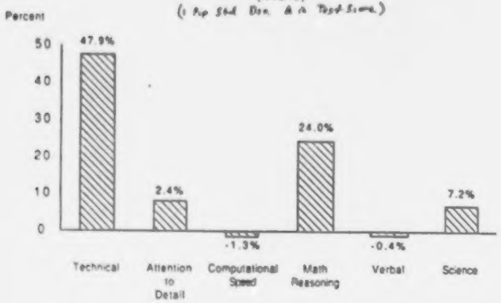


Effect of Competencies on
Work Sample Job Performance Measure
for Skilled Technical Jobs
(N=1324)
(1 Pop. Std. Dev. Δ in Test Score)

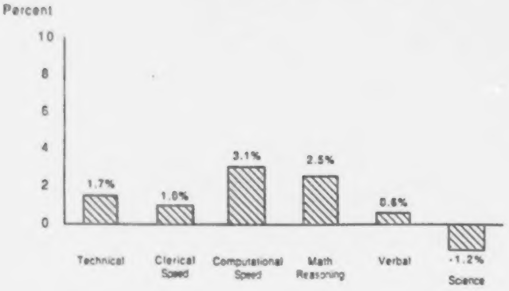


Effect of Competencies on
Work Sample Job Performance Measure
for Mechanical Maintenance Jobs
(N=131)

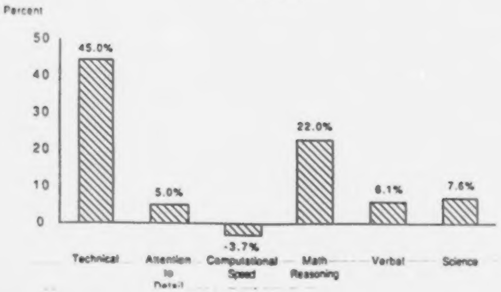




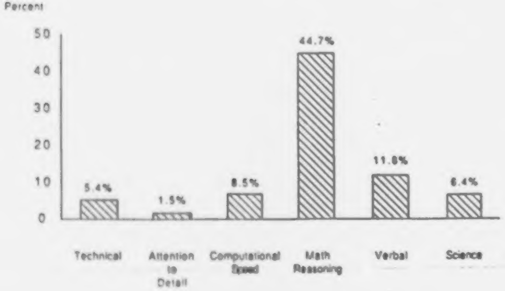
Effect of Competencies on
Work Sample Job Performance Measure
for Skilled Electronic Jobs
(N=349)
(1 Pop Std. Dev. Δ in Test Score)



Effect of Competencies on
Wage Rates of Females
(1 Pop. Std. Dev. Δ in Test Score)



Effect of Competencies on
Work Sample Job Performance Measure
for Food Service Jobs
(N=814)



Effect of Competencies on
Work Sample Job Performance Measure
for Clerical Jobs

that American employers with good jobs offering training and job security are unwilling to take the risk of hiring a recent high school graduate. They prefer to hire workers with many years of work experience. One important reason for this policy is that the applicant's work record serves as a signal of competence and reliability that help the employer identify who is most qualified. In the US recent high school graduates have no such record and information on the student's high school performance is not available, so the entire graduating class appears to employers as one undifferentiated mass of unskilled and undisciplined workers. Their view of 18 year olds was expressed by a supervisor at New York Life Insurance (a company which has moved some of its claims processing work to Ireland) who commented on television **"When kids come out of high school, they think the world owes them a living"** (PBS, March 27, 1989). Surely this generalization does not apply to every graduate, but the students who are disciplined and academically well prepared currently have no way of signaling this fact to employers.

Numerous educational leaders are coming to realize that if the labor market were to begin rewarding learning in school, high school students would respond by studying harder and local voters would be willing to pay higher taxes so as to have better local schools. Al Shankar has asked businessmen to **"Provide clear and early rewards for those students who work hard and learn the most."** The Secretary of Labor's Commission on Workforce Quality and Labor Market Efficiency also advocates such a change:

> **The business community should...show through their hiring and promotion decisions that academic achievements will be rewarded** (p. 9).
>
> **High-school students who excel in science and mathematics should be rewarded with business internships or grants for further study** (p. 11).
>
> **Schools should develop easily understood transcripts which at the request of students, are readily available to employers. These transcripts should contain documentable measures of achievement in a variety of fields as well as attendance records. State governments should provide assistance to facilitate the standardization of transcripts so that they will be more easily understood.** (Secretary of Labor's Commission on Workforce Quality, p. 12)

Schools should provide graduates with certificates or diplomas that certify the students' knowledge and competencies, rather than just their attendance. We should not use rank in class or grades measuring performance relative to others in the classroom as our signal of student accomplishment because this leads students to pressure each other not to study. Competency should be defined by an absolute standard in the way Scout merit badges are. Different types and levels of competency need to be certified.[2] Measurement of student accomplishment must be fair across schools so that schools can be held accountable for the achievement of their students.

We are the only industrialized country in the world that does not have a system providing externally graded competency assessment keyed to the secondary school curriculum. While the Japanese use a multiple choice exam, all other nations use extended answer examinations in which students write essays and show their work for mathematics problems. Generally, regional or national boards set the exam and oversee the blind grading of the exams by committees of teachers. Good grades on the toughest exams--physics, chemistry, advanced mathematics--carry particular weight. Exam grades are included in resumes and are asked for on job applications (see Exhibit 1 and 2). Parents in these countries know that a child's future depends critically on how much is learned in secondary school. As a result, parents in most other Western nations demand more of, are willing to pay more for and get more from their local schools than we do and, nevertheless, they are more dissatisfied with their schools than American parents.

What is needed is more informative credentials which signal the full range of student achievements (e.g. statewide achievement exam scores, competency check lists). The Certificate of Initial Mastery that has been proposed by the Commission on the Skills of the American Workforce is one way this assessment system might be structured.

Will the new Civil Rights Law Prevent Employers Rewarding Academic Achievement?

Employers are enthusiastic about the reform agenda I have just described. But when one asks them to give greater weight academic achievement in their own hiring, they say they will need to talk to their lawyer first.

The threat of litigation brought under the 1971 Griggs interpretation of Title 7 of the Civil Rights Act of 1965 deterred many employers from using tests measuring competence in reading and mathematics and grades in high school to help select new employees. This is one of the important reasons why youth do not on average receive significantly higher wage rates when they learn more English, science and mathematics in high school. Recent court decisions have made it easier to defend using such tests as part of a selection process, but only a few of the larger employers have reintroduced basic skills tests into their selection procedures for clerical and factory jobs. If current interpretations of Title 7 remain in force, the number of employers assessing competence in reading and mathematics prior to hiring is likely to slowly increase and the payoff to basic skills is likely to increase as well, all be it slowly. If, however, the language contained in the Civil Rights bill vetoed by President Bush becomes law, I fear that the legal impediments to the use of high school grades and scores on basic skills tests in employer hiring decisions will probably grow and the payoff to basic skills competencies uncorrelated with years of schooling will probably not increase.

I said "I fear" this will be the outcome because there does not appear to be any consensus regarding what the impact of this legislation would be on employer willingness to use indicators

NAME:

ADDRESS:

Exhibit 1
Resume of Irish
Secondary School Graduate

DATE OF BIRTH: AGE:

NATIONALITY:

TELEPHONE NO:

EDUCATIONAL DETAILS

Primary School

Post Primary

Secretarial Course

Office Procedures Course

EXAMINATIONS

Intermediate Certificate 198

SUBJECTS

English	B - L.C.	
Irish	C - L.C.	
Maths	B - L.C.	
Science	C	
Geography	C	
History	C	
Home Economics	D	

Leaving Certificate 198

SUBJECTS

English	D - L.C.
Irish	C - L.C.
Maths	C - L.C.
Biology	C - H.C.
Geography	C - L.C.
French	D - L.C.
Home Economics	B - L.C.

~~Exhibit 2~~

MVP

APPLICATION FOR AN APPOINTMENT HANDLED BY MVP
16, Highfield Road, Edgbaston, Birmingham, B15 3DU Tel: 021 455 [illegible]
United Kingdom

33

Appointment applied for [illegible] (3 x Q) Ref.No.

PERSONAL DETAILS: (block capitals)

Surname [illegible] Title MR Forenames [illegible]

Address 7, [illegible] GARDENS [illegible]

Postal Code [illegible] Tel.No Home [illegible] Work

Marital Status M Children/Dependents (with ages) [illegible]

Age 33 Date of Birth 5.8.56 Nationality BRITISH Place of Birth [illegible]

State of health OK Height 6' Weight 13st

Any disabilities/recurrent medical problems? — Regd disabled

Driving Licences CAR Car Owner ✓ Company Car

Endorsements, convictions, accidents, etc. NONE

Leisure activities and offices held in clubs and societies [illegible]

EDUCATION:
Secondary Education

From	To	School	Exams Taken (inc. grades)	Other ach
[illegible]	1972	[illegible] GRAMMAR	'O' LEVEL :- [illegible] (2), [illegible] (1), [illegible] (1), [illegible] (1), [illegible] (1), [illegible] (1), [illegible] (1), [illegible] (1), [illegible] (1) 'A' LEVEL :- [illegible] (1), [illegible] (1), [illegible] (0)	[illegible]

Further Education

From	To	College/University	Course & results (inc class/grades)	Other ach
1972	1973	[illegible]	[illegible] - 1 YEAR - [illegible]	

Other training and qualifications (inc. in company and external courses, etc.)

From	To	Establishment	Training/Qualifications
1979		[illegible]	[illegible]
1985	1986	[illegible]	[illegible]
1986	1989	[illegible]	[illegible]

Membership of professional bodies

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of academic achievement in their hiring selections and initial job assignments. I am here, therefore, to ask for clarification from the Chair and from sponsors of the bill. Let me try a few specific cases out on you. Assume in every case that a smaller proportion of minority job applicants meet this requirement than for other groups.

> Many fast food companies ask for high school grade point average on their job applications. Assuming that grades are positively correlated with retention and promotions, would this practice meet your proposed definition of business necessity? What kind of evidence would the company be required to produce to defend this practice?
>
> Company A has implemented statistical process control (SPC) and other TQC practices and has now decided it needs to increase the mathematics skills of entry level workers. It provides training to the current work force and starts testing job applicants using a 9th grade competence level as a cutoff? Is this OK? What kind of evidence does your definition of business necessity imply the company must have?
>
> Company B is planning to implement SPC and TQC next year and in preparation for this change it wants to use tests assessing math and verbal facility for all new hiring. There are no plans of offering basic skills training to current employees, though the company has a policy of encouraging and subsidizing tuition for adult education. Is this OK?
>
> Company C plans no change in production practices but has learned that research conducted in the military finds that for jobs very similar to the companies own jobs, that job performance is positively correlated with scores on ASVAB Mathematics Knowledge and Arithmetic Reasoning. The company finds a test that is similar to the ASVAB tests and starts to use them in their selection process. Is this OK? Alternatively the company starts asking about which math courses were taken in high school and what the grades were. Is this OK?

I fear that your answer is going to be "We will have to see how the courts interpret the law." or "It depends on______." If that is indeed the answer, I think we all know how companies are going to behave. Griggs almost completely eliminated employment testing for 10 years and it is only slowly being reestablished as better evidence of validity and fairness is becoming available. If they lose one of these cases, the potential liability is enormous. They will probably not take the risk of using a selection technique that is such a red flag to potential litigators. If they do they will certainly not announce it to the world.

In order for a policy of considering grades and academic achievement tests scores when making hiring selections to generate incentives to learn, students, parents and teachers must be aware that local employers are using tests and HSGPA for selection and what kind of material is included on these tests. Unfortunately, the fear of litigation has caused many employers to give only limited publicity to their use of indicators of competence in reading and mathematics. This is another reason why employers need to be told by people in authority that they are acting in the national interest when they seek out and reward those who have high level academic skills.

I hope, therefore, that you will put into the legislation some language that makes it absolutely clear that employers can, at least for recent school leavers, take academic accomplishment into account when making hiring selections and that they do not have to conduct expensive studies in their own company to justify such practices. I suggest the following draft language:

> **Employer use of measures of scholastic achievement such as grades, testimonials from teachers, state sponsored exams assessing mastery of the high school curriculum and professionally validated tests assessing reading and mathematical competence is presumed to meet the job relatedness requirements of this section when (a) the job requires more than 100 hours of employer provided formal or informal training during the first year that includes the reading of manuals or the use of mathematics or (b) pays an hourly wage that is at least 50% above the statutory minimum wage. Complaining parties have the burden of demonstrating that the measures of scholastic achievement used by an employer are not related to job performance. The provisions of this section shall not apply to any job applicant or employee who has not been enrolled in an elementary school, secondary school or post-secondary program for more than ten years prior to an employer's employment related decision.**

IV. EFFECTS OF PROPOSED REFORMS ON UNDER-REPRESENTED MINORITIES

The two blue ribbon commissions that have recommended improvements in the signaling of academic achievement to colleges and employers included substantial representation from the minority community.[3] Nevertheless, the reader may be wondering about the likely impacts of the reform proposals just described on the labor market chances of minority youth? Since minority students receive lower scores on achievement tests, it might appear at first glance that greater emphasis on academic achievement will inevitably reduce their access to good colleges and to good jobs. This is not the case, however, for four reasons.

If academic achievement becomes a more important basis for selecting students and workers, something else becomes less important. The consequences for minorities of greater emphasis on academic achievement depends on the nature of the criterion that becomes deemphasized. Substituting academic achievement tests for aptitude tests in college admissions improves minority access because minority-majority differentials tend to be smaller (in standard deviation units) on achievement tests (eg. the NAEP reading and math tests) than on aptitude tests (eg. the SAT). Greater emphasis on academic achievement improves the access of women to high level professional, technical, craft and managerial jobs because it substitutes a criterion on which women do well for criteria--sex stereotyped beliefs about which jobs are appropriate for women--which have excluded women in the past.

For the same reason, greater emphasis on academic achievement when selecting young workers will not reduce minority access to jobs if it substitutes for other criteria which also place minority youth at a serious disadvantage. The current system in which there is almost no use of employment tests and little signaling of high school achievements to the labor market clearly has not generated jobs for minority youth. In October 1985, 1986, 1987 and 1988, only 45 percent of previous spring's black high school graduates not attending college were employed (Bureau of Labor Statistics 1989). One reason why minority youth do poorly in the labor market is that most of the criteria now used to make selections--previous work experience, recommendations from previous employers, having family friends or relatives at the firm, proximity of one's residence to stores which hire youth, performance in interviews and prejudices and stereotypes--work against them. These criteria will diminish in importance as academic achievement becomes more important. There is no way of knowing whether the net result of these shifts will help or hinder minority youth seeking employment. In some models of the labor market the relative position of minority workers improves when academic achievement is better signaled (Aigner and Cain, 1975).

The second way in which minority youth may benefit from improved signaling of school achievements is that it will give recent high school graduates, both black and white, the first real chance to compete for high-wage, high-training content jobs. At present all youth are frozen out of these jobs because primary labor market employers seldom consider job applicants who lack considerable work experience. Experience is considered essential partly because it contributes to productivity but also because it produces signals of competence and reliability that employers use to identify who is most qualified. Recent high school graduates have no such record and information on the student's high school performance is not available, so the entire graduating class appears to employers as one undifferentiated mass of unskilled and undisciplined workers. A black personnel director interviewed for a CBS special on education reform proudly stated "We don't hire high school graduates any more, we need skilled workers" (CBS, September 6 1990). Surely this generalization does not apply to every graduate, but the students who are disciplined and academically well prepared currently have no way of signaling this fact to employers. State exams, competency portfolios and informative graduation credentials would change this unfair situation and give students a way of demonstrating that the stereotype does not apply to them. Young people from minority backgrounds must overcome even more virulent stereotypes and they often lack a network of adult contacts who can provide job leads and references. By helping them overcome these barriers to employment, competency portfolios are of particular help to minority youth.

The third way in which these proposals will assist minority students is by encouraging greater numbers of firms to undertake affirmative action recruitment. The creation of a competency portfolio data bank that can be used by employers seeking qualified minority job candidates would greatly reduce the costs and increase the effectiveness of affirmative action programs. Affirmative action has significantly improved minority representation in managerial and professional occupations and contributed to a substantial increase in the payoff to schooling for blacks (Freeman 1981). One of the reasons why it has been particularly effective in this labor market is that college reputations, transcripts and placement offices provide brokering and pre-screening services which significantly lower the costs of recruiting minority job candidates. The competency portfolio data bank would extend low cost brokering and pre-screening services to the labor market for high school graduates. The creation of such a data bank would almost certainly generate a great deal of competition for the more qualified minority youth in the portfolio bank.

The final and most important way in which these reforms will benefit minority youth is by bringing about improvements in academic achievement and productivity on the job. Student incentives to study hard, parental incentives to demand a better education and teacher incentives to both give more and expect more from students will all be strengthened. Because of the way affirmative action is likely to interact with a competency profile data bank, the rewards for learning will become particularly strong for minority students. Learning will improve and the gap between minority and majority achievement will diminish. Society has been making considerable progress in closing achievement gaps between minority and majority students. In the early National Assessment of Educational Progress (NAEP) assessment's black high school seniors born between 1952 and 1957 were 6.7 grade level equivalents behind their white counterparts in science proficiency, 4 grade level equivalents behind in mathematics and 5.3 grade level equivalents behind in reading. The most recent National Assessment data for 1986 reveals that for blacks born in 1969, the gap has been cut to 5.6 grade level equivalents in science, 2.9 grade level equivalents in math and 2.6 grade level equivalents in reading (NAEP 1988, 1989). Koretz's (1986 Appendix E) analysis of data from state testing programs supports the NAEP findings. Hispanic students are also closing the achievement gap. These positive trends suggest that despite their limited funding, Head Start, Title I and other compensatory interventions have had an impact. The schools attended by most minority students are still clearly inferior to those attended by white students, so further reductions in the school quality differentials can be expected to produce further reductions in academic achievement differentials.

The students of James A. Garfield's Advanced Placement calculus classes have demonstrated to the nation what minority students from economically disadvantaged backgrounds can accomplish. The student body is predominantly disadvantaged minorities; yet in 1987 only three high schools in the nation, Alhambra High School in California and Bronx Science and Stuvesant High School in New York City, had a larger number of students taking the AP calculus exam. The single high school and its two very talented calculus teachers at this school, Jaime Escalante and Ben Jimenez, are responsible for 17 percent of all Mexican Americans taking the AP calculus exam and 32 percent of all Mexican Americans who pass the more difficult BC form of the test (Matthews, 1988). There is no secret about how they did it; they worked extremely hard. Students signed a contract committing themselves to extra homework and extra time in school and they lived up to the commitment. What this success establishes is that minority youngsters can be persuaded to study just as hard as the academic track students in Europe and that if they do they will achieve at world class levels. The success at Garfield High is replicable.

Postlude

Institutional arrangements of schools and the labor market have profound effects on the incentives faced by students, teachers, parents and school administrators. The passivity and inattention of students, the low morale of teachers, the defeat of so many school levies and low rankings on international measures of achievement are all logical outcomes of institutional arrangements which weaken student incentives to study and parental incentives to fund a high quality education. Only with an effective system of rewards within schools and in the labor market can we hope to overcome the pervasive apathy and achieve excellence.

ENDNOTES

1. Estimates of average total compensation of teachers in the United States were obtained by multiplying teacher salaries derived from NEA data by the ratio of compensation to wages and salaries in the public education sector, 1.25, from the national income accounts. The data on average compensation in other countries is from UNESCO Statistical Yearbook, 1985 AND 1986. Purchasing power parity exchange rates were calculated by Prof. Robert Summers from OECD data. Steven Barro and Larry Suter, "International Comparisons of Teachers' Salaries: An Exploratory Study." National Center for Education Statistics, July 1988, Table 5.

2. Minimum competency tests for receiving a high school diploma do not satisfy the need for better signals of achievement in high school. Some students arrive in high school so far behind, and the consequences of not getting a diploma are so severe, we have not been willing to set the minimum competency standard very high. Once they satisfy the minimum, many students stop putting effort into their academic courses.

3. The Commission on Workforce Quality and Labor Market Efficiency included in its membership Constance E. Clayton, Superintendent of Schools of Philadelphia, Jose I. Lozano, Publisher of La Opinion, William J. Wilson, author of The Truly Disadvantaged. The Commission on the Skills of the American Workforce included in its membership Eleanor Holmes Norton, former Chairwoman of the Equal Employment Opportunity Commission, John E. Jacob, President of the National Urban League, Badi Foster, President of AEtna Institute for Corporate Education, Thomas Gonzales, Chancellor of Seattle Community College District VI, Anthony J. Trujillo, Superintendent of Sweetwater Union High School District.

Mr. WASHINGTON. [presiding] Thank you. We will include a copy of the entirety of your prepared testimony before the committee in the record if that may be done without objection. I hear no objection. It will be done.

Mr. Fawell.

Mr. FAWELL. I would just say thank you very much. I read your testimony last night and was very impressed with it. I wish I could give an answer to the example which you give as to whether or not they would be deemed to be unlawful employment practices under Title VII. I would tend to think that some of them certainly would.

But I am going to see what expert legal opinion we could have on the examples which you have set out. And certainly, I think many people would agree that if it is unclear, we ought to make it very clear that in hiring practices, and especially, one ought to be completely free to use those as being reasonable measurements of the ability of the employee to be able to successfully perform the job in concern.

So I thank you for bringing this out. So often we tend to forget that when one says for every justice there has to be a remedy. I agree. But every time we tighten the screw up here, we unloosen it someplace else, it seems. And when we create a business necessity definition that is so darn strict and has to go through so many loopholes and steps along the way, we do a disservice to those, black and white, potential employees who have done an outstanding job in high school and have a record that they can be proud of, who have a number of academic honors and things of this sort.

Indeed, I think that ought to always be a part of one's application. Again, I will freely say that as we interview young people here on the Hill to come to work for us, I don't think there's any of us that doesn't look at cum laude and top graduates.

Although that isn't a signal that they're going to be absolutely successful, we do think it's an awfully important area. If they can achieve and have the ability to achieve highly there, then we feel that that's an awfully good indicator of their success potential.

But I would be, and Mr. Chairman, I think also you would too, be very interested in what an objective analysis of those examples which you do give and say, "Are we going to run into trouble?" And have the armed forces technically violated the heck out of the Title VII by having this armed forces vocational testing device to which you referred?

Mr. BISHOP. Well, they have a lot of research. My point is it's going to have disparate impact, not for the forces as a whole, because obviously it hasn't for the forces as the whole. But for certain specialties that require the more technical knowledge or something, you would probably find that certain specialties, you have a disparate impact.

But they have research defending and justifying this. But I'll tell you, it's cost them a huge amount of money. And this is just one contract—$100 million. I'm sure that since World War II they spent over a couple billion dollars on the research that they've conducted. Not much of the time is the time of people within the armed forces collecting data and so forth.

So that they have the best testing program in the world. And it's one of the reasons why they're so professional. Because they train to a criterion. They have come up with measures of job performance that are not just a rating. They have measures where they watch people do the job in front of judges and so forth. They have simulation methods of seeing how good the tank crews do things. They are doing it really well.

This research has generated a lot of knowledge, which hopefully the civilian sector could use. I'm not aware of anyone proposing that this kind of evidence be used, and yet we've learned a lot from that research. And I would hope that it could be used—the evidence of what predicts job performance in civilian type jobs like repairing trucks and tanks and so forth in the military, and how that applies to an auto mechanic's job in the U.S. in the civilian economy.

Mr. FAWELL. Now I might just share this with you. Last year while we were debating this bill, and I think a definition of business necessity was essential to effective job performance, I know that the Los Angeles School District Administration, and a goodly number of them were hispanics, came to Washington and loudly objected because they felt that it was a put-down.

If you were taking that definition for business necessity to those minorities who did everything the schools and the teachers asked of them; were achievers; did accomplish a great deal. And yet they said as a practical matter, "How could anybody prove that that was essential to effective job performance?"

Probably an employer wouldn't take the risk of, therefore, requiring a record of high school achievement. And they were quite distraught over it. The last I heard from them is that they felt somewhat the same about the definition which we have now substantially related to successful job performance. And I think educators all over America ask the question, "Well, what's it to be? Are we going to roll the dice here?"

And while we're theoretically benefitting minorities, and I question that very much, in the final analysis we're certainly saying, "Don't do as the teachers tell." And as parents will advise you to get an education and stand on that, you're not even going to able to present it to an employer because it's a violation of Title VII.

So it would be interesting to see all of these examples to which you have referred and find out how attorneys who represent employers would react. What would they tell the employer to do in reference to these types of examples, assuming that the business necessity definition which is now in the bill is in the final version of any bill?

Thank you, Mr. Chairman. I have no further questions.

Mr. WASHINGTON. Very well. Professor Bishop, thank you again for the testimony that you've offered and for the thoughts you've put out there. I agree with you that we need to look at education as being one of the keys of this because I have no doubt that without strides being made by American employers, we're going to find ourselves priced out of the market in more ways than one. And that includes preparing a diverse work force.

I would rather think that, not now but in the not too distant future, consumers will look at things like the number of women in the work force and number of minorities in the work force and become more selective in buying. I'm not going to purchase from an employer that discriminates against any group, women or whomever.

And I think the Japanese and the Germans are learning that lesson. They have learned our technology. Over the last twenty years we very well know they've learned how to compete in the American marketplace. And they've done a better job of it than we have. I think that they're going to take the lessons from what has happened since 1964, even that the IBMs and the other companies don't heed the lessons of history.

And I think that once they realize that, they'll find a much more receptive consumer if that consumer can be comfortable that his or her group has been included, rather than excluded, in the jobs that allow for the production of these goods and services that they hold out and sell at their high prices on television to the American consumer.

And I think we're going to get more selective. We're not going to boycott necessarily, but we're going to become more selective. We're going to look carefully at these employers to make sure that their work force reflects a diversity. That is what makes this Nation so great. And a part of that is education.

So this bill seeks to educate the employer that in order to compete in the year 2000 and beyond, when the majority of people in this country are going to be women and minorities, if you intend to sell your products and your automobiles and your soap to them, make sure that you have a work force that reflects not only their composition in the work force, but also the kinds of jobs available. So thank you for bringing this to our attention.

The Associated General Contractors of America and the American Federation of Government Employees have submitted written statements for inclusion in the record. Without objection, it is so ordered

The committee stands adjourned.

[Whereupon, at 2:30 p.m., the committee adjourned subject to the call of the Chair.]

[Additional material submitted for the record follows.]

H.R. 1, THE CIVIL RIGHTS ACT OF 1991

H.R. 1, the Civil Rights Act of 1991, overturns a number of Supreme Court cases and strengthens existing civil rights laws. H.R. 1 is similar to the Civil Rights Act of 1990 (H.R. 4000), passed by the 101st Congress but vetoed by President Bush.

H.R. 1 is like the bill reported by the Judiciary Committee last year, with 2 additions: (1) it stresses that the bill does not require or "encourage" employers to adopt quotas and (2) it allows the court to allocate attorney's fees in challenges brought by third parties. Both of these additions were included in the final version of the bill which was vetoed by the President. H.R. 1 does not include a cap on punitive damages.

The bill overturns 5 major cases, *Wards Cove v. Atonio, Price Waterhouse v. Hopkins, Martin v. Wilks, Lorance v. AT&T*, and *Patterson v. McLean Credit Union*, as well as 5 other cases concerning attorney's fees and other technical matters.

H.R. 1 prohibits all discrimination: H.R. 1 reaffirms the prohibition against both intentional discrimination and practices that have a discriminatory effect. For 20 years, Congress and the courts have outlawed both types of discrimination.

H.R. 1 prohibits racial discrimination at all stages of a contract, not just at its initial formation. For example, racial harassment during the life of a contract is banned.

H.R. 1 prohibits intentional discrimination when an employer can justify action against an employee on both discriminatory and nondiscriminatory grounds. Although the employer's action in such mixed motive cases may be justified on nondiscriminatory grounds, H.R. 1 clarifies that intentional discriminatory conduct will not be tolerated.

H.R. 1 allows businesses to justify their practices using the standard used since 1971--"business necessity": Under the *Griggs* test, businesses that use practices which result in a discriminatory effect can continue to use those practices if they can justify the practice as a "business necessity." The *Griggs* test proved to be successful, understood by employers and employees, and *did not result in quotas*. H.R. 1 uses the same *Griggs* test.

H.R. 1 does not require or encourage "quotas": H.R. 1 contains clear language that employers are not required or encouraged to adopt hiring or promotion quotas and that numerical imbalances alone can't establish a violation.

H.R. 1 will provide the same remedies for all groups: H.R. 1 allows women and religious minorities to get the same remedies for employment discrimination as those available to racial minorities.

H.R. 1, THE CIVIL RIGHTS ACT OF 1991

H.R. 1, the Civil Rights Act of 1991, *overturns* a number of Supreme Court cases and *strengthens* existing civil rights laws, by amending the Civil Rights Act of 1964 ("Title VII") and the Civil Rights Act of 1866 ("Section 1981"). It has the same purpose as the Civil Rights Act of 1990 (H.R. 4000), which was vetoed by President Bush. H.R. 1 has been stripped of "compromise" language which sponsors added in hopes of veto-proofing the bill.

H.R. 1 is like the bill reported by the Judiciary Committee last year, with 2 additions: (1) it stresses that the bill does not require or "encourage" employers to adopt quotas and (2) it allows the court to allocate attorney's fees in challenges brought by third parties. Both of these additions were included in the final version of the bill which was vetoed by the President. H.R. 1 does not include a cap on punitive damages.

H.R. 1 OVERTURNS SPECIFIC CASES

The bill overturns 5 major cases, *Wards Cove v. Atonio*, *Price Waterhouse v. Hopkins*, *Martin v. Wilks*, *Lorance v. AT&T*, and *Patterson v. McLean Credit Union*, as well as 5 other cases concerning attorney's fees and other technical matters.

CODIFIES *GRIGGS* (overturning *Wards Cove*). In 1971, the Supreme Court held in *Griggs v. Duke Power Co.* that not only did Title VII outlaw *intentionally* discriminatory practices, it also barred practices that had a discriminatory *effect* (disparate impact) which could not be justified by "business necessity."

Under *Griggs*, after the plaintiff proves disparate impact, the employer has the burden of justifying the practice, by showing that the employment practice is required by business necessity. But *Wards Cove* shifted the burden of proving business necessity, forcing the plaintiff to prove the negative, that the practice was *not* required by business necessity.

H.R. 1 restores the pre-*Wards Cove* burden shifting standard and uses the same "business necessity" test found in *Griggs* -- a "significant[] relat[ionship] to successful [performance of the job]." 401 U.S. 424, 426 (1971). And for non-selection practices (*i.e.* those not related to job performance) the business necessity standard is "a significant relationship to a significant business objective of the employer."

PROHIBITS QUOTAS. H.R. 1 is not a "quotas" bill and makes that point in two ways by including language: (1) that employers are not required or encouraged to adopt hiring or promotion quotas and (2) that numerical imbalances alone can't establish a violation.

BANS INTENTIONAL DISCRIMINATION IN MIXED MOTIVE CASES (overturning *Price Waterhouse*). H.R. 1 rejects the *Price Waterhouse* rationale that employers may be able to *intentionally* discriminate so long as the employer can cite another, nondiscriminatory reason for the employment practice.

H.R. 1 makes it illegal for impermissible discrimination to be any factor in the employment process. If a victim demonstrates that intentional discrimination was a contributing factor, then the practice is illegal, even if NONDISCRIMINATORY factors contributed to the practice. If the victim makes this demonstration, then the court may provide a remedy for the victim, but cannot place the victim in a better position than he or she would have been absent the impermissible discrimination.

ESTABLISHES PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING COURT JUDGMENTS (overturning *Martin v. Wilks*). H.R. 1 overturns the Court's decision in *Martin* which held that persons may attack settled court decisions implementing employment discrimination claims (*i.e.* allowing continual reverse discrimination claims against the decision).

H.R. 1 sets up procedures which limit the ability of persons to challenge a settled court case if they had notice of the original proceeding, if their interests were adequately represented at the hearing, or if certified reasonable efforts were made to provide notice to interested persons. Thus, persons who knew or should have known of the resolution of the case, or whose interests were represented in the case, cannot later return to challenge the decision. H.R. 1 provides safeguards for other persons wishing to challenge a settled court case. Challenges can be made against judgments which are transparently invalid, obtained through fraud or collusion, or made by a court lacking jurisdiction. Challenges can also be made by members of a class in a class action case and by beneficiaries of a case brought by the federal government.

PROVIDES A FAIR TIME STANDARD TO BRING A LAWSUIT (overturning *Lorance v. AT&T*). In *Lorance* the Court held that a group of women could not attack a facially neutral seniority plan because they missed the deadline to file the lawsuit. The Court determined the group should have filed when the new seniority system was adopted even though their rights had not yet been adversely affected.

H.R. 1 clarifies that the statute of limitations for filing lawsuits begins to run either when the challenged practice is implemented or when it has an adverse effect, whichever occurs later.

PROHIBITS RACIAL DISCRIMINATION AT ALL STAGES OF A CONTRACTS (overturning *Patterson v. McLean Credit Union*). H.R. 1 amends 42 U.S.C. Section 1981 which prohibits racial discrimination in making and enforcing private contracts. In *Patterson* the Court ruled that the right to make and enforce contracts prevented discrimination only in the *formation* of the employment contract, but not during the life of the contract. Thus, racial harassment on the job could not be challenged under Section 1981.

H.R. 1 defines "make and enforce contracts" to include making, performance, modification and termination of contracts, and the enjoyment of all benefits, terms and conditions of the contractual relationship.

H.R. 1 STRENGTHENS EXISTING CIVIL RIGHTS LAWS

DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION. H.R. 1 responds to an anomaly in fair employment law by providing damages in cases of intentional discrimination. Title VII only provides equitable relief for victims of discrimination (*i.e.* injunctions, affirmative action, hiring, reinstatement, back pay). Damages to compensate a victim, or to punish an offender, are not available under Title VII. HOWEVER, both compensatory and punitive damages are available under Section 1981, which prohibits intentional *racial* discrimination in making and enforcing contracts, and often is used to challenge employment discrimination.

H.R. 1 provides for compensatory damages in cases of intentional discrimination, and provides for punitive damages in egregious situations. Thus, victims of *intentional* discrimination based on race, color, religion, sex and national origin will be fully protected. Compensatory and punitive damages will not be available for disparate impact claims.

Providing for damages reflects the trend to provide adequate and appropriate remedies in modern civil rights law. In 1988, Congress enacted the Fair Housing Amendments Act, lifting the $1000 cap on punitive damages and continuing to allow compensatory damages for violations of that Act.

EXTENDS STATUTE OF LIMITATIONS FROM 6 MONTHS TO 2 YEARS. This extension also follows the modern model of the Fair Housing Amendments Act.

RULE OF CONSTRUCTION. H.R. 1 contains a general response to the recent series of narrow interpretations of civil rights laws by the courts. H.R. 1 is intended to restore the generally accepted rules of statutory construction for broad construction of civil rights laws.

In recent years, Congress increasingly has enacted a series of restoration bills in response to court decisions narrowly construing federal civil rights laws (*e.g. Mobile v. Bolden* led to the Voting Rights Amendments of 1982, *Grove City College v. Bell* led to the Civil Rights Restoration Act of 1987). If these cases had interpreted civil rights laws broadly to effectuate their underlying purpose, then there would not have been the need for these various "restoration" bills.

H.R. 1 sets rules of construction for civil rights laws, requiring that laws be broadly construed to eliminate discrimination and provide effective remedies.

APPLIES TO CONGRESS. H.R. 1 explicitly applies Title VII to Congress. To avoid constitutional separation of powers problems, each House of Congress must determine its enforcement mechanism. The House has already applied Title VII to itself and enforces the law through the Fair Employment Practices Resolution.

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WHAT'S WRONG WITH THE ADMINISTRATION'S MARCH 1, 1991 ALTERNATIVE CIVIL RIGHTS BILL?

The short answer: It's even worse than before.

On March 1, 1991, the Administration offered a "civil rights" proposal which does nothing to restore most of the fundamental rights taken away by the Supreme Court decisions of 1989. More than that, this latest plan itself would do serious damage -- beyond the harm still being caused by the Supreme Court rulings -- to workers' rights that have existed for the past 25 years. Overall, the March 1 proposal is substantially worse than the last-minute October 20, 1990 White House proposal which accompanied the President's veto.

This Administration proposal is the latest in a series of transparent attempts to camouflage and divert attention from the Administration's regressive civil rights policies. Instead of a bill to protect workers from discrimination, the Administration's proposal is an employers' protection bill that would often prevent American women, persons with disabilities (including GI's injured in the Persian Gulf), and religious, ethnic and racial minorities from obtaining any effective remedy even when they are victims of intentional discrimination on the job. The following are some of the bill's serious problems:

(1) Second-class, inadequate treatment for women, disabled Americans, and religious and ethnic minorities. One of the primary reasons for the Administration's opposition to the Civil Rights Act, which it will not admit publicly, is its attempt to deny women, persons with disabilities, and religious and ethnic minorities the same right to recover compensatory and punitive damages in cases of intentional discrimination as racial minorities have under the Civil Rights Act of 1866.

The October 20 White House proposal permitted judges, not juries, to award a maximum of $150,000 and only in limited circumstances where other remedies do not provide a strong enough deterrent and where the award is "otherwise justified by the equities." It was both minimal and clearly

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unconstitutional. The current plan retreats substantially even from this meager proposal by limiting monetary relief only to claims of harassment and excluding all other types of discriminatory employment practices, such as intentional refusals to hire, denials of promotion, and firings.

This plan is also unconstitutional because it requires judges and not juries to make the awards. Beyond that, before the court may award any amount (which in no case may exceed $150,000), it must consider a series of factors which are designed mostly to limit the size of the award to the victim of discrimination. In many harassment cases, the company will be able to reduce if not avoid completely any monetary award by careful attention to the special factors. As to all other types of intentional and even egregious discrimination, employers would not have to worry about damages at all. The March 1 proposal is the most recent evidence that the Administration's repeated promises to the nation to stamp out overt bigotry and prejudice are only empty slogans.

(2) **Waiver of the right to sue.** Under Section 12 of the March 1 proposal, companies could fire current employees and refuse to hire new workers unless they agreed to sign a binding statement waiving all rights to file job discrimination complaints in a federal or state court or with the Equal Employment Opportunity Commission (EEOC). Ever since 1964, workers who suffered discrimination on the job have had the right to file complaints with the EEOC and in court. The White House proposal would change that completely by allowing firms to require workers to sign agreements providing that all job bias disputes must be decided by a private arbitrator, with no standards or protections whatsoever to ensure that procedures are conducted fairly and that bias victims can obtain adequate remedies.

This provision is inconsistent with a number of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment discrimination cases. See, for example, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and McDonald v. City of West Branch, 466 U.S. 284 (1984). American workers should not be forced to choose between their jobs and their civil rights.

This provision could limit the rights not only of women and ethnic, religious and racial minorities, but also of persons with disabilities, who only recently were extended protection by the Americans with Disabilities Act. It could prevent many discrimination issues from ever being considered by a court at any time, thereby fundamentally changing this area of law. It could make it extremely difficult, if not impossible, for victims of even blatant bias to receive fair and adequate relief.

(3) Two major sections of the Administration's previous proposal are deleted entirely. Sections 5 and 6 of the October 20, 1990 White House proposal addressed, if only partially, the problems created by two of the five principal decisions of the Supreme Court which the Civil Rights Act of 1990 was designed to reverse. One of those decisions, Martin v. Wilks, permits endless challenges to consent decrees that are intended to resolve employment discrimination cases. Another decision, Price Waterhouse v. Hopkins, actually makes it lawful for firms to engage in intentional discrimination on the basis of sex, race, religion or national origin as long as such discrimination is not the only factor that motivated the employer's action. In its March 1 proposal, however, the Administration deleted entirely the sections it previously offered to remedy the serious problems these two decisions have created, and in its place proposed language that would codify the Wilks decision.

The Leadership Conference recently issued an analysis of the substantial negative impact which the Supreme Court's 1989 decisions are continuing to have on victims of job discrimination. Page 10-16 of that analysis specially address the continuing problems resulting from the Wilks and Price Waterhouse decisions. The current White House proposal, abandoning a position taken only months ago, does absolutely nothing to address the considerable damage caused by these two rulings. As a result, the proposal would allow even blatant bias to continue to taint some job decisions and would permit disruptive attacks on court-ordered remedies and settlements in bias cases, even by those who sat on their hands and failed to act when the remedy was entered.

(4) Fails to overrule the treatment of business necessity in Wards Cove and in fact is even worse than Wards Cove. One of the principal purposes of the Civil Rights Act is to restore the requirement which originated 20 years ago in Griggs v. Duke Power Co. that employment practices which result in a disparate impact against women or minorities must be defended by proof of "business necessity" shown in terms of its relationship to successful job performance. The employer's obligation to prove business necessity was substantially diluted by the Supreme Court's decision in Wards Cove Packing Co. v. Atonio. As conservative appellate judge Richard Posner stated in Allen v. Seidman, 881 F.2d 375, 377, 381 (7th Cir. 1989), Wards Cove diluted the "necessity" in the "business necessity test" and "modified the ground rules that most lower courts had followed in disparate impact cases."

The March 1 plan does not require an employer under any circumstances to demonstrate business necessity in terms of successful job performance, nor does it require any proof of "necessity." It uses the term "business necessity" but defines it to mean just the opposite. Thus, even where a company concedes that its interests "do not require" a particular employment practice which has a strong discriminatory impact, it may continue

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using the practice under the Administration's bill if the company merely shows that its "legitimate employment goals are significantly served by" the practice.

This is almost identical to the Wards Cove standard the Civil Rights Act is designed to reverse. Indeed, the White House's Section-by-Section Analysis concedes at pages 1 and 3 that the intent of the bill is to codify the meaning of business necessity in Wards Cove. Among other things, the term "legitimate employment goals" could include community relations, customer preference, convenience, minor cost savings, corporate image and other factors unrelated to job performance. This could effectively permit even blatant discriminatory practices, such as allowing airlines to hire only young women as flight attendants due to customer preferences or permitting a business in an all-white area to refuse to hire minority workers because it is better "community relations" to limit hiring to neighborhood residents.

In addition, the most recent Administration proposal further dilutes the business necessity test by permitting employers to prove the defense by showing only that the challenge practice "has a manifest relationship to the employment in question." Unlike Griggs, this definition is extremely open-ended and is not specifically related to job performance. Under the Administration proposal, therefore, minorities and women could be excluded from employment opportunities by the use of employer practices that have no relation to their ability to perform the job.

The March 1 proposal also goes further than Wards Cove with respect to the plaintiff's opportunity to show that a practice is unlawful, even if required by business necessity, where there is a lesser discriminatory alternative that would serve the company as well. The White House proposal would limit the consideration of alternatives to those which are "comparable in cost," which would overrule Albemarle Paper and make relatively minor differences in cost an absolute defense. The proposal also limits this rule only to the rare situation where the employer "refuses to adopt such alternative" even after the plaintiff has demonstrated the availability of the alternative at trial.

(5) Disparate impact cases based on more than one employment practice are precluded altogether. Another way in which the Administration's March 1 proposal is more extreme than any previous position and more extreme even than Wards Cove is the entire deletion of the section which permits challenges to groups of practices that result in a disparate impact. Wards Cove made it much more difficult for plaintiffs to bring cases where several practices or selection criteria combined to have a discriminatory impact on women or minorities, because it required the plaintiffs for the first time to isolate the precise impact of each practice or criteria within the group.

This is often extremely difficult if not impossible to do, particularly when the company has failed to keep records necessary to make this showing. A great deal of debate last year focused on this issue and the Administration took the position that even where the plaintiff was unable to make this showing because the company deliberately concealed or destroyed its records, the plaintiff should still lose. Proponents of the bill showed that prior to Wards Cove there never was a requirement to isolate the exact impact of each component within a group of employment practices. See, for example, Green v. USX Corp., 843 F.2d 1511, 1520-25 (3rd Cir. 1988); Griffin v. Carlin, 755 F.2d 1516, 1523 (11th Cir. 1985); and Segar v. Smith, 738 F.2d 1249, 1270-71 (D.C. Cir. 1984).

Even the October 20 White House proposal permitted challenges to a group of employment practices which result in a disparate impact at least in some circumstances. The Administration now wants to preclude all such challenges in all cases, even where severe discriminatory impact has resulted from only two employment practices, where records are available to show the impact of each practice, and where the company concedes it has no evidence whatsoever of business necessity. This is nothing less than a blatant effort to abandon Griggs completely in most cases and thereby limit victims to cases where discriminatory intent can be proven.

(6) Fails to solve effectively the Lorance problem. Section 7 of the March 1 White House proposal only responds to part of the problem caused by the decision in Lorance v. AT&T Technologies, Inc., which held that certain job bias claims may be dismissed as untimely even where the complaint is filed immediately after the plaintiff is harmed by the practice, simply because the practice was adopted years earlier when the plaintiff had no reason to think it would ever adversely affect her. Like its previous proposals, the Administration's March 1 plan limits the Lorance provision to seniority systems even though the holding in Lorance has been applied to other types of employment practices, such as promotion policies.

Thus with the limiting language of the White House proposal, a female job applicant could continue to be barred from challenging a discriminatory test even if she filed a charge the same day she took the test, simply because the test was adopted more than 180 days earlier.

(7) A new defense to liability is created in harassment cases. For the first time since Title VII was enacted in 1964, the White House proposes as part of its "Civil Rights Act of 1991" to give companies a brand new defense in cases involving intentional harassment on the basis of race, religion, sex or national origin. Even where the evidence of this type of illegal harassment is undisputed, the White House bill directs the court "that no such unlawful employment practice shall be found to have occurred" if the *victim* fails to comply for 90 days after being harassed with any internal procedure devised by the company to resolve complaints.

There are absolutely no limits on what procedures the company may adopt or on the manner in which company officials could monitor the victim's compliance with such requirements. For example, victims could be forced, in order to preserve their harassment claims, to take a month off without pay "to recover from the incident and reduce tensions in the workplace." This new defense is an outrageous proposal which exemplifies the employer-protection nature of the Administration's plan.

(8) No relief for the persons most hurt by the 1989 Supreme Court decisions. In yet another major retrenchment from its October 20, 1990 position, the White House now proposes to require courts to continue to apply the decisions in *Patterson v. McLean Credit Union*, *Wards Cove*, *Lorance* and the other 1989 Supreme Court decisions for years to come, long after the effective date of the bill which is purportedly intended to reverse those decisions. Section 14 of the March 1 proposal states that the amendments "shall not apply to any claim arising before the effective date of this Act." Because cases often take years to litigate, hundreds of cases now pending at the EEOC or in court would under this plan continue to be decided under the old decisions.

For example, a disparate impact violation which occurs one day before the effective date of this Act might be litigated until the year 2000 and during that entire time the trial and appellate courts would have to apply the legal standards in *Wards Cove*, not those in the new Act. This proposal is absurd on its face. Like earlier White House proposals, this plan also would provide no relief at all to victims who lost their case solely because of the Supreme Court's erroneous decisions in 1989. This includes Brenda Patterson and more than 300 other victims of intentional racial discrimination whose cases have been dismissed since the *Patterson* decision.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

February 7, 1991

MEMORANDUM FOR THE ATTORNEY GENERAL
Re: Impact of 1989 Supreme Court Decisions

This responds to your request for a report regarding the impact of the Supreme Court's major civil rights decisions of 1989. Following the decisions, the President assigned to the Department of Justice responsibility for monitoring their impact to determine whether corrective legislation was necessary. As you know, the Administration previously concluded in light of this monitoring that legislation was appropriate to address Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), and Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989). The Civil Rights Division has continued to monitor the application by lower courts of Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989), Martin v. Wilks, 109 S. Ct. 2180 (1989), and Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989). This memorandum summarizes our findings thus far. Attached to the memorandum are summaries of the significant decisions pursuant to each case.

In Price Waterhouse, a plurality of the Court held that in a case in which the employer had multiple motives for an employment decision, if the plaintiff shows that one of those motives was the impermissible consideration of sex or race, the burden then shifts to the employer to persuade the court that it would have made the same decision even if it had not considered the impermissible criterion. The decision has worked favorably for plaintiffs: of the reported lower court decisions in the 18 months since the Price Waterhouse decision, 15 of 19 have been victories for plaintiffs. This is not surprising, given that the approach taken by the Court (Justice Brennan wrote the plurality) was as or more favorable to plaintiffs than the approach taken by 8 of the 11 courts of appeals to address the issue. And in the four cases plaintiffs lost, they would likely have lost before Price Waterhouse. The victorious plaintiffs have included Ann Hopkins, the plaintiff in Price Waterhouse, who won a substantial backpay award, attorney fees, and partnership in her accounting firm. See Tab A. Accordingly, our analysis reveals that mixed motive cases can still be brought and won.

In Wilks, the Court held that individuals who had not been parties to a decree could file a lawsuit challenging a Title VII decree as unlawful quota relief that diminished their employment opportunities. We have monitored the impact of this decision to determine whether it would result in the wholesale disruption of employment discrimination decrees. It does not seem to have

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produced this result. Thus far, a year and a half after the decision, three Title VII decisions have been reported in which Wilks played a major role. None of these decisions overturned a decree. See Tab B. While Wilks has allowed a number of claims to be filed, it is hard to see why those plaintiffs are not entitled to their day in court. Only meritorious suits -- i.e., ones in which a court found a violation of the law in the challenged consent decree -- would ever result in the decree being overturned.

Wards Cove clarified the evidentiary burdens in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., alleging that an employer's practices have disproportionately excluded individuals -- albeit not intentionally -- on the basis of race, color, religion, sex, or national origin. We have been monitoring Title VII disparate impact cases available through computer-based research decided in the eighteen months since Wards Cove. From the decisions we have reviewed, we have identified 41 in which the elements of Wards Cove were discussed as a significant basis of the decision. Of these cases, 11 are not relevant to an analysis of the impact of Wards Cove because plaintiffs failed to show a statistical imbalance at all. These cases would have failed under any standard: pre-Wards Cove, post-Wards Cove, or even the standard found in the bill vetoed by the President. The remaining 30 decisions have divided fairly evenly between plaintiffs and defendants. Plaintiffs have been able to present prima facie cases of disparate impact and, where final decisions have been rendered, they have been able to win cases with fact situations like those they won prior to Wards Cove. In all, there have been 11 rulings favorable to plaintiffs, including nine decisions on the merits after a full application of the Wards Cove principles. During this same eighteen month period, five decisions resulted in nonfinal rulings, and defendants prevailed in the remaining 14. It should be noted that the cases that defendants won would generally have been decided that way before Wards Cove; for instance, two simply affirmed decisions in which district courts had held for defendants prior to Wards Cove. See Tab C.

While numbers cannot tell the full story, our reading of the cases indicates that since Wards Cove courts have continued to examine carefully the business justification for challenged practices. They have invalidated written and oral promotion and selection tests, teacher certification examinations, reliance on word of mouth hiring, the allocation of too much discretion to those making hiring decisions, excessive reliance on interviews, and a residence requirement for applicants for municipal employment. And, in two cases, courts invalidated practices because comparable alternatives existed that would not produce the same disparate impact on minorities. These decisions demonstrate that legitimate disparate impact claims can still be brought and won.

Let me add a few caveats. No amount of monitoring will ever yield "scientific proof." We are necessarily limited to published decisions, or those that can be uncovered through computerized research; and, some of the decisions counted are not final judgments. More fundamentally, of course, we must keep in mind that the objective of Title VII and other civil rights statutes is to eliminate discrimination in the workplace, and not necessarily to permit any particular proportion of plaintiffs or defendants to prevail.

John R Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

POST-PRICE WATERHOUSE DECISIONS

In the eighteen months since *Price Waterhouse* v. *Hopkins*, there have been 19 Title VII lower court decisions applying that case. These rulings are summarized below. All but four of them were favorable to plaintiffs.

I. DECISIONS FOR PLAINTIFFS

- *Hopkins* v. *Price Waterhouse*, No. 90-7099 (D.C. Cir. Dec. 4, 1990): On remand from the Supreme Court, the district court awarded plaintiff partnership in the accounting firm, attorney fees, and backpay, reduced by her failure to mitigate damages. The court of appeals affirmed the judgment of the district court.

- *Carter* v. *South Central Bell*, 912 F.2d 832 (5th Cir. 1990): Although the underlying allegation of discrimination failed (for lack of finding of discriminatory motive or impact), the court remanded the case for reconsideration of a retaliatory discharge claim, which the district court had denied. The court held that, pursuant to *Price Waterhouse*, the burden shifted to the employer to prove that it would have dismissed the plaintiff even if the plaintiff had not pursued the claim of discrimination against the defendant.

- *Burns* v. *Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990): The court of appeals reversed a grant of summary judgment against the plaintiff in a sex discrimination hiring case, holding that the plaintiff had produced sufficient evidence of direct discrimination to shift the burden, pursuant to *Price Waterhouse*, to the employer.

- *Caban-Wheeler* v. *Elsea*, 904 F.2d 1549 (11th Cir. 1990): The district court found that the plaintiff had not made out a case of national origin discrimination. The court of appeals remanded the case because the district court failed to make any reference to the plaintiff's proffer of direct evidence of discrimination. Since direct evidence of discrimination could necessitate shifting the burden of proof to the employer to show that the same decision would have been made absent the discrimination, the district court was required to state specifically whether or not it believed plaintiff's evidence.

- *Jones* v. *Jones Bros. Const. Corp.*, 879 F.2d 295 (7th Cir. 1989): The district court's arguably appropriate judgment in favor of the plaintiff in a sex discrimination action was remanded because of insufficient factual findings. The district court should also consider "possible application" of *Price Waterhouse*. On remand, the district court found *Price Waterhouse* inapplicable and reinstated the judgment for the plaintiff (716 F. Supp. 1122 (N.D. Ill. 1989)).

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- *Waltman* v. *International Paper Co.*, 875 F.2d 468 (5th Cir. 1989): The plaintiff raised an issue of material fact concerning the defendant's motivation behind denying her promotion under the standards established by both *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *Price Waterhouse*. Summary judgment for the defendant was reversed and the case was remanded for full trial on merits.

- *Jew* v. *University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990): Female professor established that sex played a role in the vote of the senior faculty to deny her promotion to full professor, and the university failed to show that it would have made the same decision absent the impermissible motivation.

- *Faust* v. *Hilton Hotels Corp.*, Civ. A. No. 88-2640 (E.D. La. Apr. 18, 1990): Female plaintiff established that her removal from her job and replacement by a male was in part motivated by sex and amounted to a constructive discharge.

- *Halbrook* v. *Reichhold Chemicals, Inc.*, 735 F. Supp. 121 (S.D.N.Y. 1990): Female plaintiff offered sufficient evidence, pursuant to *Price Waterhouse*, that sex played a role in the defendant's refusal to promote her to the position of general counsel to defeat the defendant's motion for summary judgment.

- *United States* v. *City of Montgomery*, 744 F. Supp. 1074 (M.D. Ala. 1989), aff'd without published opinion, 911 F.2d 741 (11th Cir. 1990): Four police officers challenged the selection of a white male to be deputy chief. The court held that the four officers had established that retaliation for their participation in a prior Title VII suit had been a factor in the failure to consider the plaintiffs for the position and, pursuant to *Price Waterhouse*, held that the defendant had failed to show that it would have made the same decision absent the retaliatory motive.

- *Jindal* v. *New York State Office of Mental Health*, 728 F. Supp. 1072 (S.D.N.Y. 1990): The plaintiff showed that the defendant's proffered explanation of why he was not promoted was a pretext for discrimination, and the defendant failed to prove by a preponderance of the evidence that plaintiff would not have been promoted absent the discrimination.

- *Singletary* v. *Lane*, 53 Empl. Prac. Dec. 39,795 (N.D. Ill. 1990): The plaintiff prevailed on his race discrimination claim. After the plaintiff presented direct evidence of discrimination, the defendants failed to carry their burden of establishing that they would have taken the same actions absent the impermissible influence of plaintiff's race.

- Kelly v. Metro-North Commuter R.R., 51 FEP Cases 1136 (S.D.N.Y. 1989): The plaintiff tendered direct evidence of religious discrimination. The defendant therefore was required to establish by a preponderance of the evidence that the plaintiff would have been fired absent the religion-based animus. Summary judgment for the defendant was denied.

- Nichols v. ACME Markets, Inc., 712 F. Supp. 488 (E.D. 1989), aff'd without published opinion, 902 F.2d 1561 (3d Cir. 1990): The defendant's motion for summary judgment was denied. Whether race played a motivating part in the defendant's decision to fire the plaintiff, and, if it did, whether the defendant would have made the same decision in its absence, were found to constitute genuine issues of material fact.

- Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806 (M.D. Ala. 1989): The court rejected a school board's defense that it should prevail under Price Waterhouse on the plaintiff's disparate impact claim. Evidence did not support the school board's argument that it would not have rehired plaintiff even if she had possessed a permanent teaching certificate.

II. DECISIONS FOR DEFENDANTS

- EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990): Although the plaintiff produced sufficient evidence of racial discrimination to shift burden of rebuttal to employer, the employer established that the plaintiff would not have received promotion even if race were not considered.

- Young v. City of Houston, Tex., 906 F.2d 177 (5th Cir. 1990): The district court dismissed a white male employee's claim of discriminatory discharge. The court of appeals held that the city articulated nonpretextual, nondiscriminatory reasons for firing the employee. A supervisor's references to the employee as "white token" and "white faggot" were not enough to require that the burden of proof be shifted to the City.

- Gautier v. Watkins, 747 F. Supp. 82 (D.D.C. 1990): The court assumed for purposes of the decision that the white plaintiff had made out a prima facie case of discrimination regarding his non-selection for a vacancy within the federal agency in which he worked. The court found, however, that the black person who was selected was a superior choice and was not selected because of the color of his skin.

- Brown v. Amoco Production Co., Civ. A. No. 87-2327 (E.D. La. Aug. 1, 1989): While the evidence showed that race may have played some part in the decision to terminate the plaintiff, the defendant proved that it would have fired him in any event, because of his failure to complete assignments on time and his refusal to do an assignment.

POST-MARTIN v. WILKS DECISIONS

A number of actions have been filed since the decision -- many of which might not have survived a motion to dismiss prior to the decision -- but there has been only one reported decision on the merits of the underlying decree, and that has been reversed on appeal. And, in another decision, the collateral challenge was barred because the court found there to be sufficient identity of interests.

This absence of reported decisions may reflect the fact that these complaints present difficult and legitimate issues. Indeed, setting the party alignment may take considerable time and litigation. See Jansen v. City of Cincinnati, 904 F.2d 336 (6th Cir. 1990) (permitting black members of class whose original suit produced consent decree covering firefighter hiring to intervene -- after district court denied intervention -- in action filed by white applicants challenging affirmative action requirements of original decree). The delay may also reflect reluctance on the part of district courts to throw out decrees that they entered. The following is a summary of the reported employment discrimination decisions dealing with Martin v. Wilks.

- Van Pool v. City and County of San Francisco, C-89-4304 MHP, C-84-7098 (N.D. Cal. Dec. 10, 1990): The court granted summary judgment for the defendants against white firefighters who filed a collateral challenge to a consent decree containing numerical promotion requirements based on race. The court held that the collateral challenges were barred because the white firefighters' interests had been "virtually represented" by the union, which had intervened as a defendant in the original action and had vigorously presented all of the white firefighters' contentions regarding the invalidity of the decree. Even though the individual white firefighters had not been parties to the suit, the court -- distinguishing Martin v. Wilks -- held that there was sufficient identity of interests between the white firefighters and the union that the white firefighters were estopped from relitigating the validity of the decree's numerical promotion provisions.

- Mann v. City of Albany, 883 F.2d 999 (11th Cir. 1989): The court reversed summary judgment in favor of the defendant and remanded the case for consideration of the plaintiff's challenge to a litigated decree, pursuant to which the city alternated hiring a white person and a black person for single person offices as a means of complying with the decree's requirement that it hire 50% black and 50% white applicants for municipal employment. The court held that the plaintiff was entitled, pursuant to Martin v. Wilks, to challenge the decree, since he had not been a party in the prior case and was not in sufficient privity with the city to have had his interests represented adequately.

- Henry v. City of Gadsden, 715 F. Supp. 1065 (N.D. Ala. 1989), aff'd in part and rev'd in part without published opinion, 909 F.2d 1491 (11th Cir. 1990): The court rejected on the merits the challenge of white firefighters to a consent decree providing for a one-to-one hiring ratio of black and white firefighters. The court held that a prima facie case of discrimination was established by the complete absence of blacks from the fire department and that the decree did not unnecessarily trammel the rights of whites, since the advancement of the white plaintiffs in the fire department had not been impeded. On appeal, the Eleventh Circuit, in an unpublished opinion, reversed and remanded the case for full trial of the white firefighters' equal protection claims.

In addition to those noted above, there remain unresolved challenges that the Civil Rights Division is aware of in Boston (firefighter applicants, police applicants, police promotions), Oakland (firefighters), Toledo (firefighters), San Francisco (police), Birmingham (firefighters and sheriffs), Omaha (police), Chicago (police), Miami (firefighters), and Memphis (firefighters).

In sum, none of the collateral challenges to employment discrimination decrees available through computer-based research have been finally decided on the merits of the underlying decree. Thus, insofar as the Civil Rights Division has been able to determine, none of these decisions has yet resulted in the overturning of a decree.

POST-WARDS COVE TITLE VII DECISIONS

Summarized below are the disparate impact Title VII cases decided during the 18-month period following Wards Cove, in which Wards Cove was discussed as a basis of decision.

I. DECISIONS FOR PLAINTIFFS AFTER WARDS COVE

A. Cases Holding Disparate Impact Violations After Wards Cove

- Nash v. Consolidated City of Jacksonville, Duval County, Fla., 905 F.2d 355 (11th Cir.), petition for cert. filed, No. 90-1016 (Dec. 26, 1990): On remand from the Supreme Court for reconsideration in light of Wards Cove, the court held the pro se plaintiff's statistical evidence sufficient and concluded that plaintiff had identified a specific practice that caused the disparate impact. The court reinstated its prior opinion holding that the firefighter promotion examination at issue was discriminatory.

- Green v. USX Corp., 896 F.2d 801 (3d Cir.), cert. denied, 111 S. Ct. 53 (1990): On remand from the Supreme Court for reconsideration in light of Wards Cove, the Third Circuit reaffirmed its conclusion that USX had violated Title VII by engaging in employment practices that disparately affected blacks. It approved the use of applicant flow data for unskilled positions, held that the employment interview had been identified sufficiently as a discriminatory hiring practice, and found USX's business justification insufficient. The court reversed its prior holding that USX had engaged in intentional discrimination, but it does not appear that Wards Cove had any bearing on that point.

- Richardson v. Lamar County Board of Education, 729 F. Supp. 806 (M.D. Ala. 1989): A teacher who lost her job because of failure to pass the relevant state teacher certification tests successfully challenged the test -- pursuant to the standard announced in Wards Cove -- as producing a disparate racial impact in violation of Title VII. The court ordered her reinstatement.

- Bridgeport Guardians, Inc. v. City of Bridgeport, 735 F. Supp. 1126 (D. Conn. 1990): Plaintiffs succeeded in showing, pursuant to Wards Cove, that an alternative selection procedure for police sergeants with less disparate impact on black and Hispanic candidates could be implemented.

- NAACP v. Town of Harrison, 749 F. Supp. 1327 (D.N.J. 1990): Black plaintiffs successfully challenged the town's requirement that applicants for police, fire, and municipal employment be residents of the town, which was 99.8% non-

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black. The town had never hired a black employee, while private employers in the town had a workforce that was 22% black. The court found a significant statistical disparity between the labor pool and hirings and that the residency requirement was the cause of the disparity because it virtually eliminated blacks from consideration. The court rejected the town's business justifications.

- Ross v. Buckeye Cellulose Corp., 733 F. Supp. 344 (M.D. Ga. 1989), order supplemented, 733 F. Supp. 363 (M.D. Ga. 1990): Black employees successfully challenged a pay and promotion system by establishing, pursuant to Wards Cove, that a less discriminatory alternative existed.

- Sledge v. J.P. Stevens & Co., 52 Empl. Prac. Dec. 39,537 (E.D.N.C. 1989): The district court reaffirmed findings of disparate impact discrimination in hiring made prior to Wards Cove.

- EEOC v. Andrew Corp., 51 Empl. Prac. Dec. 39,364 (N.D. Ill. 1989): On reconsideration following Wards Cove, a magistrate reaffirmed the finding that the employer had discriminated against blacks in hiring and recruiting office and clerical workers. The court reaffirmed the sufficiency of the statistical proof and its link to the specific practice of word of mouth recruiting by the employer's white clerical and office staff. The magistrate found that the employer's cost justification was inadequate.

- Thomas v. Washington County School Board, 915 F.2d 922 (4th Cir. 1990): The court of appeals held that the school board had violated Title VII in its hiring of teachers by relying on word-of-mouth hiring and nepotism, both of which had a disparate impact on blacks. The court reversed the district court's refusal to issue an injunction and directed it to fashion relief that would require the board to advertise vacancies, fill them by a process that was not influenced by race, and prohibit the board from giving preference to relatives of employees.

B. Interlocutory Rulings Applying Wards Cove

- Emanuel v. Marsh, 897 F.2d 1435 (8th Cir. 1990): After the court of appeals ruled for the defendant, the Supreme Court remanded for further consideration. On remand, the district court ruled in favor of the defendant, but the court of appeals, pursuant to Wards Cove, held that the plaintiff had established a prima facie case of discrimination on the basis of race in promotions. The court remanded to the district court for consideration of business justification and the existence of alternatives to the practices at issue.

- Mayfield v. Thornburgh, 741 F. Supp. 284 (D.D.C. 1990): Black plaintiffs, who claimed discrimination in promotions in the Tax Division of the Department of Justice, alleged a sufficient statistical disparity and adequately identified specific practices alleged to have caused the disparity in order to survive a motion for summary judgment pursuant to Wards Cove.

II. DECISIONS FOR DEFENDANTS AFTER WARDS COVE

A. Cases In Which There Was An Insufficient Showing Of A Statistical Disparity

- Mallory v. Booth Refrigeration Supply Co., Inc., 882 F.2d 908 (4th Cir. 1989): The Fourth Circuit affirmed a decision of the district court, entered before Wards Cove, that plaintiffs, two black clerical employees of the company, had not been denied promotions to supervisory positions because of their race. In response to plaintiffs' arguments that the district court should have analyzed their claims under the disparate impact theory as well as disparate treatment, the court concluded that plaintiffs could not have prevailed on that theory, because they did not show how many employees in the pool of clerical workers were qualified to become supervisors. Thus, they did not establish a prima facie case of disparate impact and therefore the judgment would have been affirmed notwithstanding Wards Cove.

- Hill v. Seaboard Coast Line Railroad Co., 885 F.2d 804 (11th Cir. 1989): Five black railroad carmen alleged discrimination in promotion to foreman. While finding that one plaintiff was the victim of disparate treatment, the district court, in its pre-Wards Cove decision, found no disparate impact. The Eleventh Circuit affirmed the lower court's pre-Wards Cove judgment, holding that plaintiffs' statistics did not make out a prima facie case.

- Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1989): Plaintiff, a black former employee of the city who was discharged for refusing to fill out a background questionnaire, claimed that her discharge was discriminatory on the asserted ground that the questionnaire had a disparate impact on blacks. The district court granted summary judgment for the city, and the Fourth Circuit affirmed. The Court held that plaintiff had failed to prove the city's employment practice had a disparate impact against blacks. It stated in part as follows (895 F.2d at 191): "Walls has failed to satisfy her prima facie burden. She bases her claim on the speculation that, had she filled out the form, she would have been subject to some form of adverse job action based on her answers and that, in general, blacks would be subject to such action disproportionately to whites based on a statistical analysis of their likely responses. This is completely speculative. She offers no evidence that anyone, black or white, has ever been terminated or otherwise adversely affected as a result of their answers to the questionnaire. Speculation as to the potential for disparate impact cannot serve as evidence of such impact itself." Since the Supreme Court's enunciation of the disparate impact theory, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), plaintiffs always have been required to demonstrate that an employment practice has disparate impact, and we know of no case, pre- or post-*Wards Cove*, which allows speculation to substitute for such demonstration.

- *Harris* v. *Lyng*, 717 F. Supp. 870 (D.D.C. 1989): Plaintiff, a GM-14 employee in the Foreign Agricultural Service (FAS) component of the Department of Agriculture, claimed that by refusing to allow his conversion to the Foreign Service and by failing to promote him to GM-15, defendant discriminated against him because of his race, black, under both a "disparate treatment" and a "disparate impact" theory. The district court ruled that the plaintiff had proven neither disparate treatment nor disparate impact. As to plaintiff's claim of disparate impact, the court held that he had not established a *prima facie* case since he failed to show: (1) the number of black candidates who were qualified or applied for upper level positions in the FAS; (2) which of the nonapplicant blacks actually wanted such jobs or possessed the requisite qualifications; or (3) what employment practice was causing the alleged underrepresentation of blacks in the upper level positions. It thus appears that it was plaintiff's paucity of factual proof that determined the result in this case.

- *EEOC* v. *Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989): In this case, the EEOC challenged as having an unlawful discriminatory impact on Hispanics the company's policy that barred employment to applicants with a felony, theft, or larceny conviction resulting in an active prison sentence. The complaining witness, a Hispanic male, had previously been convicted of a felony, larceny, and had served in prison. The court found, *inter alia*, that the EEOC had failed to prove, by a preponderance of the evidence, that there was a significant imbalance of Hispanics at the company's terminal in question (Fort Lauderdale) or that any alleged disparity was caused by the company's conviction policy. These findings would have defeated plaintiff's case prior to *Wards Cove*.

- *Davis* v. *Alabama Department of Education*, Civil Action No. 82-6-1411-S (N.D. Ala. June 28, 1990): Plaintiffs, black employees of the Alabama Department of Education, contended that defendant unlawfully denied blacks appointment to the position of Assistant Unit Supervisor (AUS) which, in turn, denied them access to higher supervisory positions. The district court entered judgment for defendant. The court found that, during the period of time under review, defendant had appointed 27 whites and six blacks to the position of AUS. The court determined that those appointment figures were meaningless, absent a comparison with the availability of blacks in those feeder positions from which appointment to AUS positions are made; and that such comparison reflected no significant racial difference in the appointment of employees from the feeder positions to that of AUS. In this regard, the court made note of the analyses and testimony of defendant's expert that the proportion of AUS appointments to blacks in fact was slightly higher than their proportion in AUS feeder positions. Lastly, the court found that there was no "line of progression" from AUS to a higher supervisory position, and that both blacks and whites had become supervisors without having been AUS's. It appears that, on the factual record before the court in this case, plaintiffs would not have prevailed pre-Wards Cove.

o McConnell v. Noranda Aluminum, Inc., 735 F. Supp. 929 (E.D. Mo. 1990): A female plaintiff alleged both intentional and disparate impact discrimination based on her allegation that she was fired because of her husband's membership in a union. The court found no discrimination. Regarding disparate impact, it held that there was no evidence to show that the employer had a policy of firing spouses of union members or, even if it had such a policy, that it produced a disparate impact on women (the plaintiff was the only such spouse employed by defendant). The plaintiff's allegation that the firing of temporary employees during strikes produced a disparate impact on women failed for a similar lack of statistical proof. Both claims would likely have been dismissed prior to Wards Cove.

o Crump v. Dulmison, Inc., 714 F. Supp. 1200 (M.D. Ga. 1989): In a case that was largely an unsuccessful disparate treatment challenge to a seniority system, the court held that the plaintiff had also failed to produce sufficient statistical evidence to create even an inference of disparate racial impact resulting from the employer's compensation system or its method of determining participation in on-the-job training opportunities. The outcome would not have been different before Wards Cove.

o Gregory v. State of Illinois, 51 FEP Cases 652 (N.D. Ill. 1989): The female plaintiff challenged two of her employer's leave policies as discriminating against pregnant

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women. First, she alleged that the policy of requiring all employees who are physically unable to perform their jobs to take a non-occupational leave resulted in a disparate impact on pregnant women. The court held that she failed "to point to any credible evidence in support of this claim." She next contended that the policy of requiring disabled employees to return to their jobs within six months or be terminated had a disparate impact on pregnant women. The court found that she had failed to produce any evidence of the actual impact of this policy, instead basing her argument on hypotheses. On the factual record before the court, this case would undoubtedly have been decided the same way before Wards Cove.

- Douglas v. Marsh, No. 88-1781 (9th Cir. Feb. 7, 1990): The black plaintiff alleged that the Army's promotion pattern showed a disparate impact on blacks, but failed to make out a prima facie case in that "he did not introduce any statistical evidence to show that black employees were promoted differently than other employees, or even that any black employees had applied for the positions from which they were allegedly precluded." This court would have reached the same result prior to Wards Cove.

- Deshields v. Baltimore City Fire Department, No. 88-3152 (4th Cir. Aug. 24, 1989): The black plaintiff challenged the promotion exam and method of rank ordering candidates for promotion to firefighter battalion chief. The district court held and the court of appeals affirmed in an unpublished opinion that the plaintiff had failed to make out a statistical case. The data were insufficient to draw reliable statistical conclusions. This decision was unaffected by Wards Cove.

B. Cases Decided By District Court In Defendants' Favor Prior To Wards Cove And Affirmed After Wards Cove

- International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989): In this case, unions and employees challenged as constituting sex discrimination the employer's fetal protection policy that precludes fertile women from working in high lead exposure positions in its battery manufacturing operation. The district court granted summary judgment for the employer in 1988, prior to Wards Cove, and the Seventh Circuit, sitting en banc, affirmed. The Supreme Court granted a writ of certiorari and the United States has filed a brief as amicus curiae arguing that the case is not subject to disparate impact analysis but rather presents a question of disparate treatment and that the judgment should be reversed and the case remanded.

- Zamlen v. City of Cleveland, 906 F.2d 209 (6th Cir. 1990): In this case, the district court held, in a pre-Wards Cove decision, that the city's 1983 firefighter examination was not unlawful because, although the examination had an adverse impact against women, the city had shown that the examination was valid and job related. United States v. City of Cleveland; Zamlen v. City of Cleveland, 686 F. Supp. 631 (N.D. Ohio 1988). The district court found that the City had demonstrated the examination's validity under all three of the methods sanctioned by the Uniform Guidelines: content validity, criterion validity and construct validity. The court also held that plaintiffs had failed to establish the existence of an alternative selection device with utility comparable to the 1983 examination that would have a less adverse impact on females. 686 F. Supp. 631 (N.D. Ohio 1988). We did not take an appeal from the lower court's judgment; and the Sixth Circuit affirmed the lower court's judgment on appeal by private plaintiffs.

C. Decisions For Defendants After Wards Cove

- Bernard v. Gulf Oil Corp., 890 F.2d 735 (5th Cir. 1989): The Fifth Circuit affirmed the district court's findings that the tests used by the company to determine which employees were eligible for promotion to journeyman craftsmen at its Port Arthur, Texas refinery were job related and lawful under Title VII and, therefore, did not discriminate against the plaintiffs, black present and former employees of the company. The district court had found the tests to be statistically significantly correlated with performance in the crafts of boilermaker and pipefitter and had further found that the most important abilities for boilermakers or pipefitters were closely related to the most important abilities for all of the other crafts, and that therefore the tests were job related for all of the crafts. Approving the district court's approach as reasonable, the Court of Appeals noted that a similar approach had been followed earlier by another district court in the Fifth Circuit in 1981, prior to Wards Cove. Cormier v. P.P.G. Industries, Inc., 519 F.Supp. 211, 259 (W.D. La. 1981), aff'd, 702 F.2d 567 (5th Cir. 1983). Indeed, in a prior opinion, the Court of Appeals in Bernard had invited the lower court to consider this approach. Bernard IV, 841 F.2d 547, 567 n.54 (5th Cir. 1988). It is thus unlikely that the Court's affirmance of the lower court's decision turned on Wards Cove.

- Lu v. Woods, 717 F. Supp. 886 (D.D.C. 1989): Plaintiff, a Foreign Service Officer with the Agency for International Development and a native of Taiwan, claimed that AID discriminated against him on the basis of his national origin by referring to his accent in several different

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employee evaluations and otherwise treating him in a disparate manner. The district court ruled that plaintiff did not prove discrimination. The court noted that it was unclear from plaintiff's pleadings or the manner in which he tried his case whether he was alleging a disparate impact theory of discrimination. Assuming that he was, however, the court found that he failed to make a *prima facie* showing of discrimination because he did not identify the practices alleged to be responsible for this disparity.

- *Dowdy* v. *Municipality of Monroeville*, 50 Fair Empl. Prac. Cas. 557 (W.D. Pa. 1989): Three black non-resident sanitation workers, who were furloughed pursuant to a municipal ordinance that required the laying off of non-resident employees before resident employees, challenged the ordinance on the ground that it produced unlawful disparate impact because only four percent of municipal residents were black. Plaintiffs stipulated that their furloughs were not the result of discriminatory intent on the part of the municipality; and the EEOC previously had found that the municipality had not violated Title VII. Prior to the furloughs, there were fourteen sanitation employees, seven of whom were residents (three blacks and four whites) and seven of whom were non-residents (all blacks). As a result of the furloughs, the black percentage of sanitation employees went from 71.4% (10/14) to 63.6% (7/11) The district court granted summary judgment for defendant municipality, finding that the percentage of black sanitation workers after the furloughs (63.6%) far exceeded their percentage in the relevant labor market.

- *Black Law Enforcement Officers Ass'n* v. *City of Akron*, 52 Empl. Prac. Dec. 39,510 (N.D. Ohio 1989): Plaintiffs, an association of black police officers and individual black officers, contended that the promotional process utilized by the city's police department -- which included written examinations, service ratings and seniority -- had a disparate impact upon black officers. After a trial on the merits, the district court entered judgment for the city, concluding that plaintiffs had failed to make a *prima facie* showing that the components of the promotional process they challenged "caused any disparate impact on black officers." *Id*. at 60, 315. Such failure would have caused plaintiffs to lose even before *Wards Cove*. In an unpublished opinion, the Sixth Circuit affirmed the judgment of the lower court. *Black Law Enforcement Officers Ass'n* v. *City of Akron*, No. 89-3743 (6th Cir. Dec. 11, 1990).

- *United Ass'n of Black Landscapers* v. *City of Milwaukee*, 736 F. Supp. 206 (E.D. Wis. 1990): In an action in which plaintiffs contended that the city failed to promote qualified blacks to supervisory positions in its forestry department, and that there were disproportionately more blacks in one lower-paying division of the department than in another higher-paying division, the district court granted summary judgment for defendants. While plaintiffs had alleged that the racial disparity in supervisory positions resulted from the city's use of written examinations and oral interviews, the court observed that plaintiffs had offered no proof at all that those practices caused the racial disparity. The court further observed that plaintiffs had not even asserted that any qualified blacks had applied for positions in the higher-paying division and had been denied. In light of the factual shortcomings of plaintiffs' proof, the Seventh Circuit affirmed the decision of the lower court. United Ass'n of Black Landscapers v. City of Milwaukee, 916 F.2d 1261 (7th Cir. 1990).

- Sandoval v. Saticoy Lemon Ass'n, 747 F. Supp. 1373 (C.D. Cal. 1990): After merger of two employers into defendant Saticoy, defendant closed one plant and immediately hired workers for another using the seniority list of the extinguished employer, rather than its own seniority list, which would have resulted in hiring significantly more women. The court accepted the defendant's justification that it was imperative to staff the plant quickly to process ripe fruit and that the use of its own seniority list would have placed less experienced workers in these jobs. This factual showing would likely have resulted in a judgment for defendant prior to Wards Cove. In the same opinion, however, the court found that defendant had discriminated intentionally against several women by channeling them into jobs traditionally held by women.

- EEOC v. O & G Spring and Wire Forms Specialty Co., 732 F. Supp. 72 (N.D. Ill. 1990): Following Wards Cove, the district court concluded that the EEOC had not established that the defendant's reliance on word-of-mouth hiring had a disparate impact on blacks. The court held that the defendant had established a sufficient business justification in that word of mouth hiring within the Polish community ensured a ready source of workers with technical training who were willing to work for low pay under poor conditions. The court, however, found a pattern or practice of disparate treatment of blacks and, significantly, entered a judgment in favor of plaintiff. Thus, plaintiff ultimately prevailed.

- Police Officers for Equal Rights v. City of Columbus, 916 F.2d 1092 (6th Cir. 1990): Black police officers alleged that the examination for promotion to lieutenant had a disparate impact on blacks and was not sufficiently related to the job. The district court held and the court of appeals affirmed that while the test did have a disparate impact, it was sufficiently related to the knowledge that would be required of a lieutenant.

- *Taylor* v. *James River Corp.*, 51 FEP Cases 893 (S.D. Ala. 1989): The black plaintiff challenged the process by which employees were selected for the employer's apprenticeship program for millwrights and pipefitters. Selections were based on a battery of tests and an interview by a board of examiners. The court held, *inter alia*, that the tests and interview process, which had been designed by an expert in employee selection practices, had been validated in compliance with the EEOC's *Uniform Guidelines on Employee Selection*, 29 C.F.R. 160 *et seq.*, and were justified by business necessity.

- *Walters* v. *Treasury Department*, No. 89-55429 (9th Cir. June 28, 1990): The black plaintiff alleged that the defendant had discriminated on the basis of race in its failure to select him for promotion to the position of senior inspector. Specifically, he challenged defendant's reliance on a "crediting plan," which determined how much weight should be given to various factors and emphasized participation on special enforcement teams and experience with the computer system. The court affirmed in an unpublished opinion the district court's holding that the crediting plan served a legitimate business purpose. The plan ensured that senior inspectors had knowledge of appropriate search policies and facility with the computer system.

- *Bell* v. *Krogers, Inc.*, No. 89-3206 (6th Cir. Mar. 6, 1990): The plaintiff alleged among other things that the employer discriminated against her in failing to transfer her from a cashier position to a position as an office worker. The district court found that the plaintiff had established a *prima facie* statistical case, but held that the employer had produced a sufficient business justification. The court of appeals noted that the district court had improperly relied on statistics showing the number of blacks in the Toledo area, rather than comparing the number of blacks in the relevant positions to the number of qualified blacks in the labor market. It went on to affirm the district court's finding that the employer had produced a sufficient business justification, which was that office personnel must work closely and smoothly together and be capable of exercising authority. The plaintiff's employment history suggested that she was not qualified.

- *Kuhn* v. *Island Creek Coal Co.*, Civ. A. No. 88-0143-O(CS) (W.D. Ky. Aug. 28, 1990): The female plaintiff challenged the experience requirements for various positions in the safety department of the employer coal company. The court held that she did not make out a prima facie case that the requirements discriminated against women. At best, she showed that women are newcomers to the coal business; the court also held that she was less qualified than those selected for the positions she sought, and that she did not produce any evidence to overcome the employer's business justification. It is unlikely that Wards Cove affected the outcome of this case.

III. CASES REMANDED FOR FURTHER CONSIDERATION OR SCHEDULED FOR FURTHER PROCEEDINGS WITHOUT MERITS DECISION

- Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989): The court remanded for consideration whether scoring of a firefighter physical agility test, which disproportionately excluded women, violated Title VII after Wards Cove.

- EEOC v. Joint Apprenticeship Committee, 895 F.2d 86 (2d Cir. 1990): The Second Circuit reversed and remanded for further review the district court's pre-Wards Cove grant of summary judgment on liability and the issuance of a preliminary injunction in favor of the EEOC. Although the EEOC established substantial disparities based on race and sex in hiring, it did not make out a sufficient causal connection between the disparities and particular employment practices. The case was remanded for further proceedings, during which the EEOC will have an opportunity to establish a causal link.

- Davis v. City of Dallas, 748 F. Supp. 1165 (N.D. Tex. 1990): In the first phase of the litigation, the city's hiring procedures for police officers were found to produce a disparate impact on blacks. After a settlement in which most of the offending criteria were eliminated, the court determined that three disputed criteria were justified by business necessity, but scheduled further proceedings to determine whether individual victims were entitled to relief under the structure outlined in Wards Cove.

- Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989): The court affirmed the district court's holding that the employer had produced a disparate racial impact by using a test for promotion of bank examiners. It remanded for consideration of whether the employer's justification, which had been found insufficient, satisfied Wards Cove. The opinion suggested that the justification might still be insufficient and, after remand, the case settled favorably to the plaintiffs.

- Black Fire Fighters Ass'n v. City of Dallas, Tex., 905 F.2d 63 (5th Cir. 1990): In an action brought by black firefighters challenging the lawfulness of written examinations and other criteria for promotion within the city's fire department, the Fifth Circuit affirmed the lower court's denial of a motion by plaintiffs to preliminarily enjoin the city from making promotions based upon the challenged examinations and other criteria. In affirming the lower court, the Court of Appeals was careful to point out that it was making no prediction concerning the outcome of the case. The Court held that plaintiffs had not yet shown a substantial likelihood of success, because they had not made the necessary prima facie showing that the written examinations and other criteria for promotion they challenged had a disparate impact upon blacks. The Court further agreed with the lower court that even had plaintiffs made that showing, the equities were counterbalancing and, accordingly, plaintiffs' motion was properly denied.

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ANALYSIS OF JUSTICE DEPARTMENT FEBRUARY 7, 1991 MEMORANDUM ON THE IMPACT OF THE SUPREME COURT'S 1989 FAIR EMPLOYMENT DECISIONS

A key purpose of the Civil Rights Act of 1991 is to reverse a series of Supreme Court decisions in 1989 which misinterpreted Congressional fair employment legislation and seriously weakened the protections of our civil rights laws. The Justice Department's February 7 memorandum not only fails to recognize the impact of these rulings, but also represents a major step backwards for the Bush Administration on the civil rights bill. Even as he vetoed the Civil Rights Act of 1990 last year, President Bush recognized the need to respond to the Court rulings in five key cases -- the *Patterson*, *Lorance*, *Wards Cove*, *Price-Waterhouse*, and *Wilks* decisions -- and proposed legislation that was intended to at least partly counteract the results of these rulings. Now, however, the Justice Department asserts that three of these very same decisions have had no major impact, and opposes any legislative effort to respond effectively to them. Indeed, the recent Administration legislative proposal endorsed by the Department fails to respond whatsoever to *Wilks* and *Price-Waterhouse*, and would enact into law key aspects of *Wards Cove*. This backwards step towards confrontation seriously undermines the Justice Department's position.

In fact, as demonstrated in detail in this analysis, the Justice Department is flatly wrong in asserting that the decisions in *Wards Cove*, *Price-Waterhouse*, and *Wilks* have had no impact. Prior to the *Wards Cove* decision, employment law was controlled by the Court's unanimous 1971 decision in the *Griggs* case, under which employment practices which have a proven discriminatory impact are unlawful unless justified by business necessity. Courts across the country have recognized that *Wards Cove* fundamentally changed disparate impact law. In a number of cases, *Wards Cove* has required the courts to uphold employment practices that would have been struck down as discriminatory under *Griggs*. Indeed, in several cases, the courts had specifically ruled that specific employment practices were discriminatory, only to see those decisions reversed as a direct result of *Wards*

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Cove. In fact, the positions taken recently by the Justice Department itself in several job bias cases show the impact of Wards Cove.

The Justice Department also fails to recognize the impact of the Price-Waterhouse decision. Prior to Price-Waterhouse, improper bias was always illegal in employment, even where other more legitimate considerations were mixed into an employer's motives in making decisions such as refusing to grant promotions. This meant that even if the legitimate reasons prevented giving an employee a promotion in a job bias case, the discrimination itself would be ruled illegal and the employer could be stopped from discriminating in the future. As a result of Price-Waterhouse, however, even blatant discrimination is perfectly legal where non-discriminatory reasons would have led to the same job decision. In fact, Price-Waterhouse has produced precisely this result. In a number of cases, which are virtually ignored by the Justice Department, the courts have ruled that even blatant intentional discrimination must be considered legal as a result of Price-Waterhouse.

The Justice Department's primary argument as to both Wards Cove and Price-Waterhouse is that many job bias plaintiffs have won their cases even after these decisions. This completely misses the point. Of course these decisions have not made all job discrimination legal. Bias remains so severe in some parts of the workplace that even the Court's rulings cannot immunize it. But as the decisions in the lower courts clearly recognize, Wards Cove and Price-Waterhouse have significantly changed the law, making it harder for some types of bias victims to obtain relief and discouraging countless others from even trying.

The Justice Department also misses the point in its analysis of the Wilks decision. In Wilks, the Supreme Court changed the law and ruled that settlements and court-ordered remedies in job bias cases can be challenged at any time, even years after they are entered, by anyone who claims to be affected by them. The Justice Department appears to concede that as a result of Wilks, such litigation has been spawned and is continuing in many cities across the country. It contends that Wilks has had no real impact, however, because the courts have so far rejected such challenges on their merits. This completely ignores the fact that the harmful impact of Wilks has been to permit the unlimited filing of such challenges to job bias decrees in the first place, leading to potentially endless litigation and re-litigation and discouraging settlement of discrimination cases. Indeed, the fact that the challenges have been rejected on the merits underscores the point that even completely meritless claims can cause serious disruption, and that there is no good reason to permit such challenges.

As the Justice Department itself concedes, the real objective of our fair employment laws is "to eliminate discrimination in the workplace, and not necessarily to permit any particular proportion of plaintiffs or defendants to prevail." Measured against this standard, it is clear that the Department has ignored the overall impact of the Court's rulings. By legalizing even blatant discrimination under some circumstances, by making it much harder to challenge job practices with discriminatory impact, and by encouraging attacks on job bias decrees, Price-Waterhouse, Wards Cove, and Wilks have severely impeded our nation's continuing effort to eliminate workplace discrimination. Coupled with the Court's decisions in the Patterson and Lorance cases, the negative impact of which even the Department does not dispute, the continuing harm caused by these decisions makes a compelling case for the Civil Rights Act of 1991.

Wards Cove Packing Co. v. Atonio

The Justice Department's analysis simply fails to recognize the harsh impact which the Wards Cove decision has already had. This impact is evident in three specific areas: Wards Cove's overall effect on employment discrimination law, the specific court decisions affected by Wards Cove, and the positions taken by the Justice Department itself in actual litigation concerning Wards Cove.

A. The overall impact of Wards Cove

Courts around the country have recognized that Wards Cove has fundamentally changed Title VII law. Conservative appellate court judge Richard Posner wrote for the Seventh Circuit that Wards Cove had diluted the "necessity" in the "business necessity test" and "modified the ground rules that most lower courts had followed in disparate impact cases". Allen v. Seidman, 881 F. 2d 375, 377, 381 (7th Cir. 1989). The Third Circuit explained that Wards Cove has created "significant changes in employment discrimination law." Green v. USX Corp., 846 F.2d 801, 804 (3d Cir. 1990). The Eleventh Circuit commented that Wards Cove had "overruled the existing law in the Circuit" on business necessity. Hill v. Seabord Coast Line Railroad Co., 885 F.2d 804, 812 (11th Cir. 1989). See also, e.g., Hinton v. Board of Trustees, 53 FEP cases 1475, 1478 (N.D. Ill. 1990)(stating that Wards Cove "changed prior law" on defendant's burden to show business necessity).

Even beyond Wards Cove's effect on particular cases, the overall impact of the decision in changing the law has important consequences. As a matter of law, Wards Cove has "drastically increased the difficulty of proving a disparate impact case, and rendered some kinds of employment practices virtually immune from disparate impact analysis." Holdemand, "Civil Rights in Employment: the New Generation," 67 Den. U.L. Rev 1 (1990). The result will inevitably be to discourage bias victims and lawyers from even filing disparate impact cases, producing a serious "chilling effect on the aspirations of racial minorities and women." Rabinove, "Major U.S. Supreme Court Civil Rights and Affirmative Action Decision", NYLS Jl. of Human Rights 9, 31 (1990).

B. Wards Cove's Impact on Particular Cases

Wards Cove has also had a significant effect in a number of important individual job bias cases. In at least a dozen cases, Wards Cove either caused a court to vacate a previous decision finding that an employment practice had an illegal disparate impact, or contributed to a decision rejecting a job discrimination claim. The Justice Department has failed to recognize the specific impact of Wards Cove in these cases, and in fact failed to mention several of these cases whatsoever.

In four cases, the courts had rules under Griggs that a job practice had an illegal disparate impact, only to see Wards Cove force reversal or vacating of those decisions. A decision that a city fire department had unlawfully discriminated against female applicants was vacated and remanded as a result of Wards Cove in Evans v. City of Evanston, 881 F. 2d 382 (7th Cir. 1989). Wards Cove resulted in the vacating of a ruling in favor of a class of minority bank examines in Allen v. Seidman, 881 F. 2d 375 (7th Cir. 1989). The EEOC successfully proved that an electrician apprenticeship program discriminated against women and minorities, but the decision was vacated and remanded due to Wards Cove in EEOC v. Joint Apprenticeship Comm., 895 F. 2d 86 (2d Cir. 1990). And Wards Cove required one court to vacate its own prior decision that a "word of mouth" recruitment policy had an unlawful disparate impact on minorities in EEOC v. O & G Spring and Wire Forms Specially Co., 732 F. Supp. 72 (N. D. Ill. 1990).[1]

Wards Cove's impact has also been significant in at least 8 other cases, most notably Bernard v. Gulf Oil Corp., 890 F. 2d 735 (5th Cir. 1989). Relying on Wards Cove, the court in Bernard upheld a refinery's promotion practices which had a disparate impact, even though there was absolutely no direct evidence that the tests used had any relation to job performance for three of the job categories involved. In fact, studies revealed no significant relationship at all between test scores and job performance for these three jobs. Nevertheless, the court effectively just assumed that the test was valid for these three jobs even without such evidence, effectively overriding the actual study results and directly contradicting Griggs.

While avoiding any contention that this extraordinary holding can possibly be reconciled with Griggs, the Justice Department's analysis of this case incorrectly claims that Wards Cove did not influence the result. It is true that a Fifth Circuit decision handed down in the case the year before Wards Cove had invited the lower court to consider this approach, but the Justice Department fails to mention that the 1988 decision refused to determine whether such analysis would be reliable. That crucial question was left for later decision. *See* 841 F. 2d at 568 note 56 ("We reserve consideration of the reliability of this method and leave this determination to the district court.") The Fifth Circuit's post-*Wards Cove* decision upholding these analyses repeatedly relied on *Wards Cove*.

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[1] Although the Justice Department memo notes that Evans and Allen were "remanded," it fails to acknowledge that the practices in those cases were ruled illegal under Griggs prior to Wards Cove. Both Evans and Joint Apprenticeship Comm. are still pending in the lower courts. After the decision in their favor was vacated in Allen, the plaintiffs settled their claim for relief less favorable than previously ordered by the courts. In O&G Spring, the court ruled that the employer had violated the plaintiff's rights under the disparate treatment doctrine under the specific facts of the case.

Other cases in which *Wards Cove* contributed to a decision against job bias plaintiffs include:

o *Police Officers for Equal Rights v. City of Columbus*, 916 F. 2d 1092 (6th Cir. 1990): The court upheld a police promotion exam despite a finding that the exam had a significant disparate impact on black police officers. Important to the court's decision was a ruling that, contrary to previous challenges to such exams, the plaintiffs bore the burden of proof on business necessity due to *Wards Cove*. The district court ruled that in future cases, plaintiffs could be required under *Wards Cove* to perform a complex multiple regression analysis to show disparate impact, a requirement that would further harm bias victims. Even the Justice Department does not contend that *Wards Cove* had no impact in the case.

o *Hinton v. Board of Trustees*, 53 FEP Cases 1475 (N.D. Ill. 1990): Even though it assumed that a hospital's lay-off practices had a disparate impact on black employees, the court ruled that under the change in law produced by *Wards Cove*, the practices were legal. The Justice Department does not mention the case.

o *United Assoc. of Black Landscapers v. City of Milwaukee*, 916 F. 2d 1761 (7th Cir. 1990): The court rejected a challenge to promotion practices in a city department that had resulted in absolutely no blacks in 50 supervisory positions during the entire history of the department because, under *Wards Cove*, the specific employment practices had not been identified with sufficient particularity. Even the Justice Department does not maintain that *Wards Cove* had no impact on the case.

o *Black Law Enforcement Officers v. City of Akron*, 52 EPD 39510 (N.D. Ohio 1989): The court ruled against black police officers challenging city promotion practices. Although the Justice Department asserts that the plaintiffs would have lost regardless of *Wards Cove*, both the lower court and the court of appeals relied specifically on *Wards Cove* in ruling that the plaintiffs had not identified the practices causing the disparate impact with sufficient particularity. The appellate court ruled that plaintiffs must show which particular questions or parts of a promotion test cause adverse impact based on *Wards Cove*--a requirement which, as discussed below, will make it even harder to prevail in disparate impact cases.

o *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734 (S.D. Fla. 1989): The court rejected an EEOC claim that a company policy refusing to hire for life anyone convicted of crime discriminated against Hispanics. Although the Justice Department claims that *Wards Cove* did not influence the decision, the court refused to consider an alternative 5-10 year ban proposed by the EEOC as less discriminatory because *Wards Cove* required the EEOC to bear the burden of proof on the issue and specifically cited *Wards Cove* in reaching its decision.

o *Abbott v. Federal Forge, Inc.*, 912 F. 2d 867 (6th Cir. 1990): Citing *Wards Cove*, the court upheld a moratorium on hiring workers laid off at another plant because it would decrease costs, despite a showing of disparate impact on older workers under the ADEA. The Justice Department does not mention the case.

o *Lu v. Woods*, 717 F. Supp. 886 (D.D.C. 1989): The court ruled against a job bias claim by an Asian-American on the grounds that the plaintiff had not specified precisely how each identified practice had resulted in the alleged disparity as required by *Wards Cove*. Even the Justice Department does not contend that *Wards Cove* had no impact on the decision.

The Litigation Position of the Justice Department Itself

The Justice Department itself, in defending Title VII cases brought against it, has been arguing that *Wards Cove* imposes on plaintiffs a far greater burden of proof of disparate impact than was required under *Griggs*. The litigation position of the Justice Department is perhaps the clearest indication of its position on the impact of *Wards Cove*, but is not mentioned in, and in fact contradicts, its memorandum.

In *Allen v. Seidman*, 881 F. 2d 375, 378-79 (7th Cir. 1989), the Justice Department claimed that disparate impact was not shown by proof that 84% of white bank examiners passed a promotional test for bank examiners, compared with only 39% of black bank examiners passing. In that case, the Justice Department claimed that, because of *Wards Cove*, plaintiffs had the burden of performing a complex statistical procedure called a multiple regression analysis to show that it was the test, and not difference in personal characteristics, which cause the differences in test scores.

The court of appeals rejected the argument in *Seidman* itself. But the district court in *Police Officers for Equal Rights v. City of Columbus* (C.A. No. C2-78-394, S.D. Ohio, February 5, 1990), *aff'd on other questions*, 916 F. 2d 1092 (6th Cir., 1990), agreed that under *Wards Cove* a multiple regression analysis might have to be performed in order to show the disparate impact of a promotional test for Police Lieutenant, but held that the city had waived the point by failing to attack plaintiff's proof of disparate impact on that basis. Putting such a burden on plaintiffs would enormously increase the difficulty and expense of proving disparate impact.

In Allen v. Seidman, the Justice Department also argued that plaintiffs were required "to pinpoint particular aspects of [the test] that were unfavorable to blacks." 881 F. 2d at 381. The Seventh Circuit rejected that argument. This argument was accepted, however, in Black Law Enforcement Officers Association v. City of Akron, supra. There, the court of appeals held that plaintiff's showing of disparate impact in a promotional examination must go beyond showing statistically significant disparities in promotion rates based on a rank-ordered examination. In addition, plaintiffs must show which particular questions or parts of the examination had the disparate impact.

The Justice Department's study on the impact of Wards Cove discusses only the district court's opinion in the case, without mentioning the novel holding of the court of appeals, in express reliance on Wards Cove, that plaintiffs are required to break up a test into parts in order to prove disparate impact. If the courts generally adopt the approach suggested by the Justice Department and upheld in the Akron case, this requirement will greatly multiply the expense and difficulty of making adverse-impact showings. Not only must plaintiffs make a showing as to the test as a whole, they must also make showings for each individual question (100 on some tests), and each individual sub part of a test.

Much of the Justice Department's enforcement effort under Title VII involves the enforcement of consent decrees. Those decrees commonly include provisions requiring the defendants to develop new selection procedures. If the new selection procedures have disparate impact against minorities or women, these decrees require the defendants to demonstrate that the procedures are valid under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607.1.

Since the issuance of the Wards Cove decision, the Justice Department has attempted to avoid the impact of Wards Cove in its own cases by repeatedly arguing that Wards Cove does not apply to its challenges to new selection procedures which have disparate impact against minorities or women, and that as a matter of contract the pre-Wards Cove law reflected in the Uniform Guidelines should continue to govern those cases, E.g., undated 1989 Memorandum of the United States in Support of Motion to Terminate Interim Hiring Goals at 4, filed in United States v. City of Buffalo, C.A. No. 73-414 (W.D.N.Y.). This position was accepted in an opinion reported at 721 F.Supp. 463 (W.D.N.Y., 1989).

In defending Title VII cases brought against Federal agencies, however, the Justice Department argues that Wards Cove substantially weakens plaintiffs' ability to prosecute their cases. In addition to its arguments in Allen, the Justice Department has filed a motion to decertify the Class in a case against the Library of Congress, Cook v. Billington, C.A. No. 82-0400 (D.D.C., motion filed June 20, 1990). What has changed, says the Justice Department in its memorandum, is the entry of the Wards Cove decision. It argues that plaintiffs cannot use disparate impact theory to challenge subjective practices, as allowed in Watson, unless the plaintiffs can identify some precise mechanism by which the persons engaging in subjective discrimination rigidly and uniformly discriminate. This is not possible in a case such as Cook, plaintiffs are alleging the manipulation of qualification requirements and promotional procedure in a constantly-changing manner, and so the Justice Department argues that Wards Cove does not allow a disparate impact challenge to excess subjectivity to be brought at all.

If the Justice Department truly believes that Wards Cove makes no difference, it would not be making these arguments in the cases it prosecutes, or in the cases it defends. In fairness to Congress and the public, the Justice Department should not make representations in its memorandum which differ so dramatically from the representations it makes to the courts.

Price Waterhouse v. Hopkins

The Department of Justice's February 7, 1991, memorandum fails to recognize the serious impact of the *Price Waterhouse v. Hopkins* decision. Prior to *Price Waterhouse*, the courts had ruled that employers were always liable for intentional discrimination, even if legitimate considerations were mixed with unlawful bias in motivating an employment decision, such as the refusal to promote an employee. While an employee could not obtain a promotion as a remedy in a job bias case if non-discriminatory reasons would have caused the same result, courts in such cases did find the discrimination unlawful and could order the employer to stop discriminating in the future and to pay the plaintiff's attorneys fees.[2] In *Price Waterhouse v. Hopkins*, however, the Supreme Court ruled that where an employer can show that the same decision would have been made for non-discriminatory reasons, even blatant discrimination is perfectly legal and courts may award no relief whatsoever.

The Justice Department's review of *Price Waterhouse*'s impact in the lower courts focuses exclusively on the number of favorable rulings obtained by individual plaintiffs and defendants. This numerical survey completely ignores the fundamental question of whether proven, intentional discrimination should be condoned by Title VII and unremedied in the courts. The Justice Department's current position on this question directly contradicts the earlier positions of both the Reagan and Bush Administrations. In its Supreme Court brief for the government in *Price Waterhouse* itself, the Reagan Justice Department stated that where non-discriminatory factors would have produced the same employment action in the absence of discrimination, the plaintiff is entitled to "an award of attorney's fees and an injunction against future discrimination."[3] In vetoing the Civil Rights Act last year, President Bush also agreed that courts should be able to award relief for proven discrimination, and included a provision in his alternative bill to provide such relief "consistently with the principles enunciated in other civil rights cases" before Price Waterhouse.[4] The Justice Department offers no explanation for its apparent retreat from this position.

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[2] *See, e.g.*, Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985); King v. Transworld Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Ostroff v. Employment Exchange, Inc., 638 F.2d 302 (9th Cir. 1982); Nanty v. Barrows Co., 660 F.2d 302 (9th Cir. 1981); Roberts v. Fri, 29 F.E.P. Cases 1445 (D.C. Cir. 1980); *see also* EEOC Commission Decision No. 70-925, 72-0591, 72-0606, CCH EEOC Decisions (1973) Pars. 6158, 6314, 6310; Commission Decision Nos. 75-007 and 75-091, CCH EEOC Decisions (1983) Pars. 6436, 6528 (supporting the position that a finding of invidious motivation is dispostive of Title VII liability, leaving open only the scope of appropriate remedy).

[3] Brief for the United States as Amicus Curiae at 24, *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989) (No. 87-1167) (citations omitted).

In fact, a reading of lower court opinions indicates that Price Waterhouse has served to legitimate blatant discrimination in the workplace. For example, in EEOC v. Alton Packaging Corp.,[5] the court found no Title VII liability, despite the fact that the plaintiff provided direct proof that intentional discrimination had played a role in the employer's promotion process. The court found that one of the two persons who decided not to promote the plaintiff had stated that "if it was his company, he wouldn't hire any black people,"[6] and the other person making the decision had yelled at another black employee "--- ---- it, you people can't do a ------- thing right." However, because the employer could show that the plaintiff would not have been promoted even if the workplace were free from bias, the defendant escaped all liability for its conduct under Price Waterhouse, and the plaintiff could not obtain injunctive relief or attorneys fees. Because of Price Waterhouse, the same two managers who harbor racial animus can continue to make promotion decisions that affect black employees.

The Justice Department dismisses the Alton case with the statement that "the plaintiff would not have received promotion even if race were not considered." This completely misses the point. No one has suggested that in such cases the employee should receive a promotion. The Justice Department analysis, however, ignores the fact that as a result of Price Waterhouse, the employer in Alton may continue to discriminate in future promotions. As courts had ruled before Price Waterhouse, Title VII and the interests of justice require that courts have the authority to remedy such blatant discrimination through awarding attorneys fees and injunctive relief.

Price Waterhouse also legalized invidious discrimination in Pajic v. CIGNA,[7] a case not even mentioned in the Justice Department's survey. In Pajic, the plaintiffs, two women, proved that they had been repeatedly subjected to adverse employment actions, and ultimately terminated, in connection with their

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[4] Section By Section Analysis of Proposed Administration Bill (1990) at 3.

[5] 901 F.2d 920 (11th Cir. 1990).

[6] Id. at 922.

[7] 1990 U.S. Dist. LEXIS 16278 (E.D. Pa. Nov. 30, 1990).

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efforts to obtain pay equity for women. After the company finally approved the salary adjustments that the plaintiffs had been requesting for ten years, the defendant's Director of Human Resources warned the plaintiffs not to act like "shop stewards" in informing their predominantly female staff that the pay raises would not be retroactive, and threatened to hold the plaintiffs personally responsible for any EEOC lawsuits. Another manager involved in the adverse employment actions against the plaintiffs had made several discriminatory remarks regarding women employees, referring to them as "broads, bimbos and glorified secretaries."

Although the court credited this evidence of discriminatory motives, it found that legitimate, non-pretextual reasons would have produced the same employment actions, and relied on Price Waterhouse v. Hopkins to deny the plaintiffs any remedy whatsoever. Consequently, the plaintiffs were unable to obtain attorneys fees or injunctive relief to prevent future discrimination. Because of Price Waterhouse, the employer in Pajic succeeded in intentionally discriminating against female employees without so much as a reprimand from the court.

Price Waterhouse has also forced other courts to ignore evidence of bias in cases involving racial discrimination against white as well as minority employees. For example, in Gautier v. Watkins,[8] the court accepted the EEOC's finding that race played a role in the determination not to promote a white employee, and in Brown v. Amoco Production Co.,[9] the court found that an impermissible racial motive may have played some part in the decision to terminate a black employee. After Price Waterhouse, however, these impermissible racial criteria will continue to factor into the decision-making process, because in both cases the existence of non-discriminatory factors that would have produced the same employment actions prevented the courts from responding to the discrimination.

The Justice Department nevertheless asserts that Price Waterhouse has not had a negative impact because many plaintiffs have continued to win mixed-motive cases where employers failed to prove that they would have taken the same action even if they had not discriminated. This analysis completely misses the point. It has never been suggested that Price Waterhouse would make such cases more difficult for plaintiffs to win. However, where employers can show that they would have taken the same action absent discrimination, Price Waterhouse legalizes even the most blatant discrimination, precluding courts from even ordering the discrimination to cease. In addition, since so many Title

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[8] 747 F. Supp. 82 (D.D.C. 1990).

[9] 1989 U.S. Dist. LEXIS 8952 (E.D. La. July 31, 1989).

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VII cases involve multiple motives, the risk that Price Waterhouse will make a court unable to award any remedy--such as ordering the discrimination to stop or awarding the costs of bringing the lawsuit--will inevitably deter plaintiffs from challenging blatant and intentional bias in the workplace.

Martin v. Wilks

The Justice Department seriously understates the significant impact of the Martin v. Wilks decision. Its analysis completely misses the point.

The Justice Department is certainly correct that most of the "reverse discrimination" collateral attacks and interventions under Martin v. Wilks which have been decided to date have upheld the challenged decrees. This confirms the argument of the bill's proponents that these challenges are not meritorious, and that it is best to resolve these questions once and for all at the time of the adoption of the original decree.

The question is not whether the Wilks decision "would result in the wholesale disruption of employment discrimination decrees";[1] it is whether the Martin decision would embroil settling plaintiffs and defendants in repetitive, meritless litigation. There are three principal evils of such endless and meritless litigation:

- It wastes the resources of plaintiffs, defendants, and the courts and makes it more difficult to eliminate discrimination because of the multiplication of time and effort to resolve discrimination lawsuits.
- It risks the elimination of the strongest of all incentives to settle a case on mutually agreeable terms: bringing an end to the costs and uncertainties of litigation.
- It inflames the emotions of applicants and employees to stir up litigation time and again, to no avail.

It is difficult to compile a comprehensive list of reverse-discrimination challenges under Wilks until a decision has been reported. There is no means of collecting information nationwide on new case filings in State and Federal courts, and the Equal Employment Opportunity Commission is barred by law from releasing the names of respondents to any charge of discrimination, including "reverse discrimination" charges. Unless one learns of the existence of the charge directly from the charging party or the respondent, they do not come to public attention until a case has been filed in court and until the existence of the case itself somehow comes to public attention. On-line computerized news databases such as NEXIS are not too useful because there is no common set of words used in news articles which would make it possible to collect even published news on the filing of Wilks-type challenges.

Even with these limitations, however, it is clear that an impressive array of challenges to decrees have been brought or maintained under *Wilks*:

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[1] February 7, 1991 Memorandum to the Attorney General at 1.

- Birmingham Fire Department, Alabama[2]
- Birmingham Police Department, Alabama
- Birmingham Engineering Department, Alabama
- Birmingham Streets and Sanitation Department, Alabama
- Gadsden Fire Department, Alabama
- Jefferson County, Alabama
- Jefferson County Sheriff's Department, Alabama
- Jefferson County Personnel Board, Alabama
- Oakland Fire Department, California
- San Francisco Fire Department, California (2 cases)
- San Francisco Police Department, California
- San Francisco Community College District, California (3 cases)
- San Francisco Unified School District, California
- United States Forestry Service, Bay area, California
- Albany, Georgia
- Chicago Police Department, Illinois
- Boston Fire Department, Massachusetts
- Boston Police Department, Massachusetts (hiring)
- Boston Police Department, Massachusetts (promotions)
- Omaha Police Department, Nebraska (at least 5 cases in court and 9 administrative proceedings)
- New York Police Department, New York (2 cases)
- Cincinnati Fire Department, Ohio (3 cases)
- Cincinnati Police Department, Ohio

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[2] The challenges to the Birmingham and Jefferson County decrees are multiple.

Cleveland Fire Department, Ohio (2 cases)

Toledo Fire Department, Ohio

Youngstown Police Department, Ohio

Pittsburgh Police Department, Pennsylvania (2 cases)

Memphis Fire Department, Tennessee

Memphis Police Department, Tennessee (2 cases)

Many of these cases are still pending in court, and will continue to tie up --- pointlessly --- the resources of the original plaintiffs and defendants for years to come. Wilks has clearly had a substantial negative impact.

Title VII's Failed Promise:

The Impact of the Lack of a Damages Remedy

IMPACT UPDATE

A Report by the

NATIONAL WOMEN'S LAW CENTER

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EXECUTIVE SUMMARY

Title VII of the Civil Rights Act of 1964, a key part of the federal scheme to assure equal opportunity in employment, prohibits employment discrimination on the basis of race, sex, color, religion and national origin. Title VII provides victims of discrimination a range of remedies for the injuries they have suffered but it does not include either compensatory or punitive monetary damages. These limited Title VII remedies stand in stark contrast to the full range of damages available under §1981, a post Civil War statute which prohibits intentional employment discrimination on the basis of race as well as membership in certain religious and national origin minority groups -- but not on the basis of sex or disability.

The National Women's Law Center has updated the study it first prepared in February, 1990 regarding the impact of the lack of a damages remedy in Title VII. ("Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy") This update reinforces the central finding of our original study that the remedies available for intentional discrimination under Title VII are inadequate. It is an ongoing tragedy that many victims of employment discrimination are not compensated for the injuries they suffer, and employers are neither punished for nor deterred from discrimination.

Under the current law, a discrimination victim who proves that his or her rights have been violated under Title VII has the following remedies available: reinstatement to the job if he or she was wrongfully fired, not promoted, or not hired in the first place, court orders prohibiting future discriminatory behavior, and/or awards of back pay if the victim lost wages because of the discrimination. Title VII remedies do not include monetary compensation for injuries such as ill health or emotional distress or financial injuries other than back pay which result from the discrimination. This is true whether the discrimination takes the form of unequal pay, a failure to hire, harassment, an unfair discharge, the imposition of a glass ceiling, or any of the many other forms of discrimination found in the workplace. Nor do Title VII remedies include punitive damages -- monetary awards against wrongdoers for particularly egregious discriminatory acts which serve the dual function of punishment and deterrence. Yet #1981 and other civil rights statutes provide such remedies. As a direct result, many proven victims of unlawful employment discrimination receive little or no recompense for the injuries they suffer. At the same time, many discriminatory employers have little incentive to come into compliance with the law, because they know that they stand to lose relatively little even if they are judged in violation of the law.

The following points summarize the major conclusions of the report and offer several real-life examples of their impact:

1. Individuals who suffer medical, psychological, and other financial harm as a direct result of unlawful discrimination are not compensated for those injuries

- Nancy Phillips suffered severe financial difficulty and emotional stress after her employer fired her because she was pregnant. This was severely exacerbated by the fact that she lost her health insurance which she had counted on to cover her pregnancy and delivery. She received no compensation for many of these injuries even though the court found that her employer violated her rights. [EEOC v. Service News Co. (1990)].

- Betty Sowers suffered a psychological breakdown after being sexually harassed and discriminatorily denied a promotion. She received nothing for her emotional distress or for the lost employment opportunities. [Sowers v. Kemira, Inc. (1988)].

- Helen Brooms was severely sexually and racially harassed on the job until she finally quit after her supervisor showed her sexually explicit photographs and threatened her life. She fell down a flight of stairs trying to escape him and subsequently suffered a severe depression. The court found that her rights had been violated, but because of the limitations of Title VII she received no compensation at all for her medical injuries. [Brooms v. Regal Tube Co. (1989)].

- Ramona Arnold, a police officer, suffered severe anxiety, depression and stroke-level high blood pressure as a result of a campaign of sexual harassment by her fellow officers and supervising officers. Although the Court held that she had been severely discriminated against, she received nothing for these injuries. [Arnold v. City of Seminole, Okl. (1985)].

2. Because of Title VII's limitations, many victims receive no compensation of any type, even when they prove they have suffered severe discrimination

- The court found that Hortencia Bohen, a fire dispatcher, had "endured extreme and ongoing sexual harassment", including unwanted sexual touching by her co-workers and being told by her supervisor that what she really needed was to be raped in the bushes. Nonetheless, she received no relief under Title VII. [Bohen v. City of East Chicago, Indiana (1986)].

- Gail Derr quit her job after she was unfairly demoted by her supervisor. He told her that it was "dangerous" for women to get too much education and scolded her for having career ambitions when she had two children. Despite the fact that the court found she had been unlawfully discriminated against, Ms. Derr received no compensation because of Title VII's limitations. [Derr v. Gulf Oil Corp. (1986)].

3. Discrimination Victims Who Suffer Professional Injuries Which Are Not Directly Wage Related Are Not Compensated Under Title VII

- Nancy Ezold bumped against a glass ceiling and suffered permanent damage to her career after being discriminatorily denied a promotion to a prestigious law partnership. However, there are no available remedies under

Title VII to compensate her fully for the injury she suffered. [Ezold v. Wolf Block (1990)]

♦ Dr. Jean Jew's scientific career suffered a major setback after she was harassed and maligned by her coworkers. In addition to confronting her glass ceiling through the loss of a promotion, her reputation in the national scientific community was seriously damaged, impeding career mobility and her competitiveness for research grants. Although she was granted her promotion and back pay, the court had no power to award Dr. Jew any remedy under Title VII to address the permanent damage done to her career. [Jew v. Univ. of Iowa (1990)].

♦ Curtis Cowan received nothing under Title VII after he had been passed up for promotion to a managerial position three times because he was black. The court denied Mr. Cowan back pay because he would not have earned more as a manager during the relevant, short-term period, and Title VII provided no remedy for the humiliation he suffered or the long-term prospects he lost. [Cowan v. Prudential Insurance Co. of America (1988)].

4. State Law Does Not Provide A Sufficient Alternative: State Tort Laws Typically Include Requirements Which Are Extremely Difficult To Satisfy, And Many Victims Are Barred By State Worker's Compensation Laws From Suing Their Employers In Tort Altogether

♦ Tamara Class proved that her supervisor made sexually explicit statements and invitations which were "inconsiderate, rude, vulgar, uncooperative, unprofessional and unfair." The court found, however, that this did not constitute infliction of emotional distress. The only reason her case was not thrown out was that she also alleged retaliation. [*Class v. New Jersey Life Insurance Co.* (1990)].

♦ Helen Brooms, the nurse whose case is discussed above, was prevented altogether from suing her employer in tort because the court ruled that state worker's compensation law barred such suits. [*Brooms v. Regal Tube Co.* (1989)].

5. With Its Compensatory and Punitive Damages Remedy 42 U.S.C. §1981, The Post-Civil War Statute Which Prohibits Racial Discrimination In Employment, Affords Significantly More Meaningful Remedies Than Are Available Under Title VII[1]

♦ Alice Brice was repeatedly passed over for promotion and otherwise discriminatorily treated. Under §1981, she recovered $50,000 in compensatory damages for a serious medical and nervous condition she suffered as a result of the discrimination and $15,000 in punitive damages. [*Williams v. Owens-Illinois, Inc.* (1982)].

♦ Christine Townsend was also discriminatorily denied a promotion. Because she was limited to a claim under Title VII, however, she had no claim to damages. Her relief consisted solely of reinstatement and back pay. [*Townsend v. Washington Metropolitan Area Transit Authority* (1990)].

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[1] It should be noted that §1981 has been severely limited by the Supreme Court's decision in *Patterson v. McLean Credit Union* (1989). The §1981 cases above may have come out differently if they had been brought post-*Patterson*.

- Charles Grubb was demoted and fired from his 18-year job as a laundry manager because his employer's new manager believed a black man had no business supervising white women. Mr. Grubb recovered $25,000 under #1981 for his emotional distress. [Grubb v. Foote Memorial Hospital (1985)].

- Virginia Delgado was discriminatorily discharged after being harassed and denied a promotion. Because she was unable to find another job she suffered extreme financial hardship and resulting permanent injury to her health. As the victim of sex discrimination, however, she could only invoke Title VII remedies and had no claim for damages. [Delgado v. Lehman (1987)].

- Alvin Hunter was subjected to a severe campaign of racial harassment and was discriminatorily discharged for complaining. Under #1981 he received $25,000 for indignity and stress and $25,000 in punitive damages. [Hunter v. Allis-Chalmers Corp., Engine Div. (1986)].

- Lois Robinson suffered extreme sexual harassment at her job as a shipwelder where she was subjected to pervasive obscene behavior. She was awarded $1 in nominal damages and no other monetary relief under her Title VII claim. [Robinson v. Jacksonville Shipyards, Inc. (1991)].

Conclusion

Title VII has a two-pronged goal: it seeks to eliminate the effects of past discrimination and to deter future discrimination. The record shows that both of these goals are severely compromised when, because there is no damages remedy, discrimination victims go uncompensated for injuries they suffer as a direct result of prohibited discrimination and employers go unpunished for, and undeterred from repeating, their egregious acts.

A STUDY OF THE IMPACT OF TITLE VII'S FAILURE TO INCLUDE A DAMAGES REMEDY ON VICTIMS OF INTENTIONAL EMPLOYMENT DISCRIMINATION

I. Introduction

Title VII of the Civil Rights Act of 1964, 42 U.S.C. #2000e *et seq.*, which prohibits unlawful discrimination in virtually all aspects of employment,[2] "is a broad remedial measure, designed 'to assure equality of employment opportunities.'" *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982), quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). However, it provides only limited remedies to victims of intentional discrimination which do not include damages.[3] Its remedies are confined, instead, to injunctive and other equitable relief,[4] with the latter principally including reinstatement and back pay.[5] These remedies address actual lost wages and the prohibition of future illegal activity through the use of injunctions, but they offer no compensation for the many non-wage injuries which often flow from employment discrimination. Moreover, they are not designed to deter discrimination or to punish egregious discrimination.

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[2] Title VII prohibits employment discrimination based on race, sex, color, religion and national origin.

[3] The "overwhelming weight of authority" holds that punitive and compensatory damages are not available under Title VII. *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138 (3rd Cir. 1986), *cert. den.* 107 S.Ct. 474, (1986) *citing* *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363 (11th Cir. 1982); *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1107 (6th Cir. 1981). *But cf.* *Beesley v. Hartford Fire Insurance Co.*, 717 F. Supp. 781 (N.D. Ala. 1989) (plaintiff seeking compensatory and punitive damages in Title VII claim allowed a jury trial over defendant's objections).

[4] Title VII provides that upon a finding of discrimination "the court may enjoin . . . such unlawful employment practice, and order such affirmative action as may be appropriate, which

Title VII remedies stand in stark contrast to those provided to victims of intentional race discrimination in employment under 42 U.S.C. § 1981. Section 1981, a post Civil War statute which has been interpreted to protect members of certain religious and ethnic minority groups as well as racial minorities -- but not women -- offers full compensatory and punitive damages. It thus provides the discrimination victims within its coverage full

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may include, but is not limited to, reinstatement . . ., back pay . . ., or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g).

[5] In some cases, courts have awarded discrimination victims "front pay" where the equitable remedy of reinstatement is not appropriate, usually because the working conditions are exceptionally contentious and not expected to improve with an injunction. See, e.g., Thorne v. City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986); Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1984); Goss V. Exxon Office Systems Co., 747 F.2d 885, 890 (3rd Cir. 1984.). Front pay has also been deemed an appropriate remedy when a deserved promotion is not readily available to a plaintiff because innocent workers would be displaced through no fault of their own. Spears v. Board of Educ. of Pike Cty., Ky., 843 F.2d 882, 886 (6th Cir. 1988); Pitre v. Western Elec. Co., Inc., 843 F.2d 1262, 1279 (10th Cir. 1988). However, it should be noted that courts do not automatically award front pay when reinstatement is not proper. See Shore, supra at 1159 (where reinstatement is not possible, front pay is "sometimes" an appropriate remedy, but does not lend itself to a per se rule).

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redress for their injuries without Title VII's limitations.[6] It also punishes egregious discrimination and provides a powerful deterrent to future illegal discrimination through the mechanism of punitive damages. Neither compensatory nor punitive damages are available under Title VII.

The National Women's Law Center has undertaken a study of the impact of Title VII's failure to provide damages to proven victims of intentional discrimination.[7] Because of #1981's complementary remedial structure, those who suffer the consequences of Title VII's limitations are principally, but not exclusively, women. The record clearly shows that Title VII often fails to achieve its underlying goals, as it leaves many victims of employment discrimination without remedies for their proven injuries and allows many discriminatory employers to avoid any meaningful liability.

This problem is faced by victims of the full range of discrimination prohibited by Title VII. Victims of harassment who currently have no Title VII remedy for many grievous injuries -- often including extensive medical, psychological and other emotional injuries -- are one example. However, meaningful remedies are often unavailable to other discrimination victims as well, including those who ultimately quit their jobs in despair or frustration, who are illegally discharged or not promoted, or who suffer harm that indirectly affects their wages.

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[6] Section 1981's scope and coverage was severely reduced by the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). Before Patterson, #1981's prohibition of racial discrimination in the making and enforcement of contracts applied to all phases of an employment relationship. In Patterson, the Supreme Court dramatically narrowed the application of #1981, holding that it only applied to the initial creation of an employment contract, and did not pertain to any racial discrimination or harassment that took place during the employment relationship. If many of the cases described below had been brought after Patterson, the discrimination victims would not have been permitted to pursue their claims at all.

[7] This study updates the National Women's Law Center's February, 1990 review of this problem, "Title VII's Failed Promise: The Impact of The Lack Of A Damages Remedy."

This report will first review the real life impact of the lack of a Title VII damages remedy by examining actual cases. It will then review why other damages remedies, principally state remedies in tort, do not resolve the problem. Finally, it will compare remedies awarded in successful § 1981 actions with those awarded under Title VII to illustrate vividly how victims of intentional discrimination are afforded significantly different relief, depending on which statutes are available to them. All of the examples in this report are drawn from reported cases.[8]

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[8] Of course, for every reported Title VII case there are many which are not reported. There are also dozens which never reach the courts for the very reason that is at issue here: there is no damages remedy in Title VII. If Title VII's equitable remedies provide no meaningful relief to a victim of discrimination, there is, obviously, little reason to bring suit in the first place.

II. Title VII's Remedies Stop Far Short of Providing Adequate Relief For Many Victims of Discrimination

A. Because Title VII Has No Damages Remedy, Discrimination Victims Who Suffer Medical, Psychological and Other Financial Harm Are Not Compensated For Those Injuries

The effects of employment discrimination often extend far beyond lost wages. But since Title VII provides no monetary recompense for non-wage injuries, it does not compensate discrimination victims for the often severe medical, emotional and other economic injuries they suffer. Yet often precisely such injuries are directly traceable to prohibited discrimination and occur either in the absence of or in addition to a loss of income. Moreover, despite the egregious nature of much of this discrimination, Title VII plaintiffs cannot claim punitive damages.[9]

A case in point is the experience of Nancy Phillips who was fired when she told her employer that she was pregnant. EEOC v. Service News Co., 898 F. 2d 958 (4th Cir. 1990). Ms. Phillips not only lost her job but also her family's health insurance at a time when that insurance was of paramount importance due to her pregnancy. She and her family were unable to pay the medical bills for her pregnancy and delivery and were successfully sued by the hospital which threatened to send a marshall to their home to collect the judgment. According to Ms. Phillips, her family was barely able to make ends meet during the pendency of the litigation and went deeply into debt, well beyond the medical bills. While Ms. Phillips was ultimately found to have been a victim of illegal sex discrimination and was awarded back pay and the medical costs incurred in connection with her pregnancy, she recovered nothing for the years of stress and humiliation caused by her family's financial difficulties.

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[9] The cases below detail the discrimination victims' non-wage injuries insofar as they were reported in the opinions. However, since discrimination victims cannot recover damages for their medical and emotional trauma and expenses and other non-wage injuries under Title VII, there is no reason for them to introduce evidence regarding such injuries; it is likely that the individuals discussed below suffered far more harm than was actually reported in the cases. In several situations we have relied on other sources to describe the nature of the harm at issue. These are noted in the text.

Virginia Delgado was illegally harassed, discriminatorily denied an increase in salary and eventually discriminatorily discharged by her supervisor, the head of a navy EEO office. Delgado v. Lehman, 665 F. Supp. 460 (E.D.Va. 1987). During the years between the discrimination and her ultimate vindication by the courts, she lived in poverty. Although she actively sought alternate employment, she was unsuccessful. Ms. Delgado describes scraping by on borrowed money, often with insufficient funds to eat properly. She lacked medical coverage and therefore neglected her health. When she was finally able to afford a dentist, she lost several teeth because of the lack of care. Although she eventually received back pay, she declined a court award of reinstatement. Her supervisor was still on the job, and she simply could not return to her previous job under such circumstances. She took early retirement instead which represented a financial loss from what she would have received in salary. She was never compensated for that loss, her medical injuries, or the stress and humiliation she suffered as a direct result of the discrimination.

Betty Sowers was denied a promotion to a permanent engineering aide position because she rejected a supervisor's sexual advances, and was eventually retaliatorily demoted. Sowers v. Kemira, Inc., 701 F. Supp. 809 (S.D. Ga. 1988). The supervisor had invited Ms. Sowers to a "skinny dipping" party and to have sex in the store room. He told her that if she would "play his game" she would get the promotion. Ms. Sowers suffered a psychological breakdown, forcing her to go on disability. While the court awarded her back pay and a nine-month lump sum front pay award to give her some time to recover and find another job, this did not compensate Ms. Sowers for the abuse she suffered, the lost employment opportunities and the medical bills she incurred and would continue to incur. Moreover, the court acknowledged that "it is possible that plaintiff's disability will continue beyond nine months."

Frances Danna was the victim of intentional sex discrimination and harassment in her traditionally male service technician position. Danna v. New York Telephone Co., 752 F. Supp. 594 (S.D.N.Y. 1990). Her supervisors denied her guidance and adequate training; her supervising manager stated that "one way or another" he would "get this bitch" and that if she would act more "feminine and cutesy" other service technicians would do her work for her. "Extremely vulgar and sexually explicit graffiti" was directed at her and she was told that what she needed was a "good fuck in the ass." Ms. Danna finally requested a downgrade to escape the harassment; her employer took advantage of her request, demoting her to an "unprecedented" degree despite her qualifications and substantially reducing her pay. The court awarded Ms. Danna reinstatement, back pay and injunctive relief. She received nothing, however, for the humiliation and stress she suffered from the harassment and the demotion or from the financial problems caused by the cut in pay.

Carolyn Gaddy's supervisor discriminatorily refused to allow her to work overtime because she was a mother and it was his view that her children needed her at home. *Gaddy v. Abex Corp.*, 884 F.2d 312 (7th Cir. 1989). This same supervisor sexually harassed her. Eventually she was discriminatorily discharged from her job. While Ms. Gaddy ultimately recovered back pay and reinstatement with lost seniority, she was never compensated for the harassment or any stress caused by the discrimination. Following her discharge she had gone to extraordinary lengths to find another job, contacting over one hundred employers and using two employment agencies, all to no avail.

Helen Brooms, a black industrial nurse, was racially and sexually harassed by her supervisor. *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989). The supervisor routinely showed her pictures of black women performing sexual acts and made offensive comments. The harassment culminated in an incident where he showed Ms. Brooms a picture of a black woman performing an act of bestiality, grabbed her arm, and threatened to kill her if she moved. Ms. Brooms "ran away, screaming and falling down a flight of stairs as she fled," and subsequently quit. For three years after she left her job, she underwent extensive therapy to combat the severe, debilitating depression resulting from the harassment, and was able to work only sporadically. While Ms. Brooms was ultimately awarded back pay pursuant to a Title VII suit, she received no compensation for the medical bills, therapist's bills, and other non-wage-related injuries she suffered.

Carol Zabkowicz was not compensated for medical problems she experienced as a result of severe, on-the-job harassment. In a vicious campaign of harassment, her co-workers had called her derogatory sexual names, dropped their pants in front of her, posted pornographic pictures with her initials written on them around the workplace and verbally abused her. Zabkowicz v. West Bend Co., 789 F.2d 540 (7th Cir. 1986).

James Williams suffered through racial slurs, "jokes" and "pranks", such as the posting of a Ku Klux Klan application on the company bulletin board, in an oppressively racist work environment. The trial court found that Williams' employer had violated Title VII, but "regretted" that it could not award Williams damages under Title VII for his emotional distress and psychological problems which resulted, at least in part, from the harassment. Williams v. Atchison, Topeka & Santa Fe Ry., 627 F. Supp. 752, 757 (W.D. Mo. 1986).

Ramona Arnold, a female police officer, suffered extreme sexual harassment and retaliation for her complaints about the harassment. Arnold v. City of Seminole, Okl., 614 F. Supp. 853 (D. Okl. 1985). Sexual pictures with her name written on them were posted around the stationhouse, and signs saying "Do women make good police officers? NO!" were posted in the workplace and on her supervisor's car. The court found that the harassment extended into Ms. Arnold's personal life as well: her minor son was arrested and taken into the stationhouse for completely unjustified reasons, and she and her firefighter husband were told that if they filed complaints, their city jobs would be in jeopardy. Under Title VII, Ms. Arnold recovered only back pay for the harassment period, and an injunction against future harassment. Since Title VII does not provide for compensatory damages, she could not recover for the "massive anxiety and depression" and "stroke-level" high blood pressure that the court found she suffered as a result of the harassment.

Joseph Dual, a black E.E.O. officer for the General Services Administration of the federal government, was demoted for retaliatory reasons in violation of Title VII after he filed a complaint against his employer. Dual v. Griffin, 446 F. Supp. 791 (D.D.C. 1977). Until his demotion, Mr. Dual had received "outstanding" evaluations from his supervisors. All he was able to recover under Title VII was reinstatement to his former position, clearance of false reports from his records, and restoration of the sick leave expended by him for health problems resulting from the retaliatory demotion. Mr. Dual was not compensated for the health problems themselves and their attendant expenses, as Title VII does not provide such relief.

Another example is that of Rodney Compston, a millwright, who got along well with his supervisor until the supervisor learned that he was of Jewish descent. Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976). After that, the supervisor called Mr. Compston "Goddamn Jew", "kike" and "Christ-killer" in front of his co-workers. The court stated, "[w]ere compensatory damages available to a Title VII plaintiff, this Court would not hesitate to enter such an award in this case, because it is apparent from the evidence that Compston suffered mental anguish and humiliation at defendant's hands." Because of Title VII's limitations, however, Mr. Compston only received nominal damages of $50.

B. Because of the Absence of Damages, Discrimination Victims Who Are Driven to Quit Their Jobs Often Fail to Recover Any Relief At All Under Title VII

Similar problems in attaining meaningful redress for their injuries confront discrimination victims who are driven to quit their jobs. Such plaintiffs must sustain a heavy burden in showing that they were "constructively discharged" -- forced to quit by insufferable work conditions -- before they are able to recover the only currently available Title VII remedies of back pay or reinstatement.[10] Without a damages remedy, bona fide discrimination victims suffering from emotional distress or medical injuries directly caused by the discrimination, for example, can be barred from all relief if they quit their jobs. If damages were available under Title VII, such victims would be able to recover for the actual harm they suffered even if they could not prove constructive discharge. These cases arise in both the harassment and the general discrimination context.

An example is provided by the experience of Shirley Huddleston, a car sales representative, who was a victim of a campaign of sexual harassment by her co-workers and supervisors. She was called "bitch" and "whore" in front of her customers, and was threatened with being stripped of her clothes. She finally quit. The court found that Ms. Huddleston had, indeed, been

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[10] Different jurisdictions have varying standards for establishing constructive discharge, but a showing of prohibited discrimination has not been enough by itself in any court. *See, e.g.*, *Maney v. Brinkley Mun. Waterworks and Sewer Dept.*, 802 F.2d 1073, 1076-77 (8th Cir. 1986) (court affirmed finding that plaintiffs were discriminated against, but vacated back pay award and reinstatement because they were not constructively discharged, the standard being whether the employer intentionally made working conditions so difficult that a reasonable person in employees' shoes would feel compelled to resign) *citing* *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). *See also* *Paroline v. Unisys Corp.*, 879 F.2d 100, 108 (4th Cir. 1989) (constructive discharge occurs only when an employer specifically intends to make the work conditions intolerable in an effort to induce the employee to quit) *citing* *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985).

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sexually harassed but it upheld the trial court's finding that she was not constructively discharged. Therefore, she did not receive any of the limited remedies now available under Title VII for the harassment she endured. Even if the court had found that she had been constructively discharged, Ms. Huddleston would not have been compensated for the emotional distress she suffered as a result of the harassment. Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900 (11th Cir. 1988).

Theresa Contardo, a stock broker, also received no remedy under Title VII because she failed to meet the burden of proving constructive discharge. Contardo v. Merill Lynch, Pierce, Fenner & Smith, 1990 WL 217068 (D. Mass. 1990). Ms. Contardo resigned her position after she was repeatedly denied participation in lucrative business activities, excluded from social gatherings where important information was exchanged, not fairly compensated for financial products she developed, and subjected to a "lockerroom atmosphere" of harassment on the job. Although the court found that "sex discrimination has cast a shadow on the plaintiff's relationship with the defendant from the very outset," it denied her claim of constructive discharge because it found that there were no additional factors beyond "mere" discrimination. Nonetheless, this same judge, considering the same facts, awarded Ms. Contardo punitive damages under Massachusetts state law, finding that "the purposes of [the Massachusetts] statute will be served by the deterrent effect of this award, by deterring what I believe to be endemic and habitual discrimination against women by undisciplined discretionary decisions in workplaces dominated by men."

Gail Derr quit her job after she was demoted from associate lease analyst to accounting clerk. Prior to her demotion, she had received favorable reviews and had been expecting a promotion. *Derr v. Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986). Her supervisor had often scolded her for having career ambitions when she had two small children at home, and said that it was "dangerous" for women to get too much education. In her Title VII action, the appellate court found that she had been discriminated against but held that she could not receive back pay or be reinstated unless she had been constructively discharged. The standard for constructive discharge in her jurisdiction was whether a reasonable person in the employee's situation would feel compelled to resign; a finding of discrimination alone did not satisfy the test. In the absence of a finding of constructive discharge, Ms. Derr would recover no relief at all. Even with such a finding, she would not recover any relief for the humiliation and frustration she suffered from being demoted because she was a woman.

In still another example, Jeanne Harrington, a physical education instructor, was left without a remedy even though the court found that her employer intentionally discriminated against her when it provided her with work facilities substantially inferior to those of the male physical education instructors performing the same duties. The court rejected Ms. Harrington's constructive discharge claim on the basis that she had taken a disability retirement by the time she filed suit. Title VII's equitable remedies were unavailable and she received no recompense for the discriminatory treatment she suffered. Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192 (6th Cir. 1978), cert. den. 441 U.S. 932 (1979).

C. Because of the Lack of Damages, Discrimination Victims Whom The Court Finds Were Fired For Other Reasons Receive No Compensation for the Actual Discrimination They Did Suffer

Even if a court finds that a person has suffered egregious employment discrimination, the victim may not receive any relief from Title VII if the court determines that the victim was fired from his or her job for reasons unrelated to the discrimination. While it may be inappropriate to award an employee fired for legitimate reasons reinstatement or back pay, it does not follow that a bona fide discrimination victim should be barred from obtaining relief related to the discrimination.[11]

The Seventh Circuit in Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235 (7th Cir. 1989) denied Patricia

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[11] Furthermore, it is clear that harassment and other discrimination can severely affect the victim's physical and psychological health. While deference should be granted to the findings of the courts, it is often a problematic proposition that an employee who is fired for poor work performance during the time that he or she has undergone serious harassment or other discrimination truly has been fired for reasons entirely unrelated to the discrimination.

Swanson any relief for the sexual harassment she suffered as an assistant finance manager for an automobile dealership. Even though the court upheld the trial court's finding that Ms. Swanson had been subject to sexually suggestive remarks, humiliating comments and physical contact by the manager and part-owner of the dealership in violation of Title VII, it did not award her any relief because it found that Ms. Swanson had been discharged for reasons unrelated to her harassment. The court admitted that "this result may seem harsh, since Swanson has proved sexual harassment in the workplace", but was constrained by the fact that "no damages are available under Title VII (to redress violations of Title VII that have not led to the discharge)". Id. at 1240.

Johnnie Mae Mitchell, a black secretary-receptionist, was racially and sexually harassed by her supervisor, who referred to blacks as "niggers" and "cocksuckers" in her presence, repeatedly made gestures to his genitals in front of her, and left Playboy magazines in the women's restroom (Ms. Mitchell was the only female employee). Mitchell v. OsAir, Inc., 629 F. Supp. 636 (N.D. Ohio 1986). Her supervisor told a sales representative that Ms. Mitchell "gave good service", and the representative then called her with sexually explicit requests. Ms. Mitchell was afforded no relief for this harassment, despite a finding that she had been discriminated against, because the court determined she had been fired for reasons unrelated to the harassment. The court described the situation as "an indictment of Title VII's failure to adequately recompense plaintiffs who have suffered from intolerable work environments," and went on to note that

> There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities she has suffered in private. . . when she is precluded from recovering damages for her perpetrators' behavior. It is, however, the responsibility of Congress, rather than this Court, to recognize and repair this deficiency in the statute. Id. at 643 (emphasis added).

In a similar case, Hortencia Bohen, a dispatcher for a fire department, "endured extreme and ongoing sexual harassment" on her job. Bohen v. City of East Chicago, Indiana, 799 F.2d. 1180 (7th Cir. 1986). Her supervisor rubbed his pelvis against Ms. Bohen on many occasions, her co-workers constantly described their sexual fantasies, in which she was the object, to her, and a captain informed her that what she really needed was to be raped in the bushes. The court found that

> sexual harassment was the general, on-going, and accepted practice at the. . . [f]ire [d]epartment, and high-ranking, supervisory, and management officials responsible for working conditions at the department knew of, tolerated, and participated in the harassment. Id. at 1189:

Nonetheless, Ms. Bohen received no relief under Title VII because the court determined that she had been fired for reasons unrelated to the harassment and that no damages for her harassment were available under Title VII.

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Ray Wells received no relief under Title VII to compensate him for what the court called "vicious, frequent and reprehensible" racial harassment. EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384 (D. Minn. 1980). Mr. Wells' co-workers called him "nigger", scrawled Ku Klux Klan graffiti on freight carts, and made it so difficult for him and another black worker to eat in the company lunchroom that they resorted to eating lunch by themselves in another room (the door of which was soon after inscribed with "nigger lunchroom"). The court found that while Mr. Wells had been harassed, he was fired for reasons unrelated to the harassment, and so was not eligible to receive the available Title VII remedies of back pay or reinstatement. Since damages were not available, he could not recover for the extreme emotional distress he suffered related to the harassment.

D. In the Absence of Damages, Discrimination Victims Who Have Suffered Professional Injuries Which Are Not Directly Wage-Related Do Not Receive Compensation Under Title VII

Back pay is awarded only when the victim can demonstrate that his or her actual salary has been affected by the discrimination, i.e., through the loss of a raise or the job itself. As a result, many discrimination victims receive no, or incomplete, relief for their injuries even though they bear on wage issues. In contrast, if damages were available under Title VII, a discrimination victim would be able to seek compensation for all economic injuries suffered, not just those that impinge directly on wages.

An example of the problem is presented by the case of Nancy Ezold who was denied promotion to partnership at a major Philadelphia, Pennsylvania law firm because of sex discrimination. Ezold v. Wolf Block Schorr and Solis-Cohen, 751 F. Supp. 1175 (E.D. Pa. 1990). In an extensive decision the court found that Wolf Block had subjected Ms. Ezold, who was fully qualified for the job, to a far more rigorous standard than her male colleagues in making the partnership decision. For example, despite her protests she was assigned less challenging work and was then criticized for not handling complex matters. She was called "too demanding" while male associates reproached for not being "aggressive enough" were made partners. And she was criticized for being "too concerned with women's issues" while the sexual harassment by a male associate of another employee was viewed as "insignificant." Following the discriminatory partnership decision Ms. Ezold left Wolf Block. Despite diligent efforts she has been unable to find comparable employment and believes that she will be permanently unable to get her career back on track or regain her discriminatorily reduced earning potential.

As of this writing, the remedies in Ms. Ezold's case have not been determined. However, the currently available Title VII remedies cannot make her whole. Her ambition was to be a successful partner at a prestigious law firm. The discrimination

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she suffered, the glass ceiling that she encountered, has virtually assured that she will never reach that goal. Even if she is awarded reinstatement, she is extremely unlikely to rise through the partnership ranks based on her merit. Wolf Block full well understands Title VII's limitations. Following the court's decision, the law firm described Ms. Ezold's victory as merely "symbolic." See testimony of Nancy Ezold before the House Education and Labor Committee.

Similarly, Title VII remedies cannot begin to compensate Dr. Jean Jew for the professional injuries she suffered as a direct result of sex discrimination. Dr. Jew, a medical neuroscience researcher and faculty member at the University of Iowa College of Medicine, endured thirteen years of sex harassment which resulted in the denial of a promotion and permanent damage to her career. Jew v. Univ. of Iowa and the Bd. of Regents of the Univ. of Iowa, 1990 U.S. Dist. LEXIS 15128 (S.D. Iowa 1990). Male faculty members spread rumors accusing Dr. Jew of moving up in the department by providing sexual favors. She was called a "whore," "bitch," and "slut;" cartoons appeared on doors depicting her in sexual acts; she was ridiculed in graffiti on bathroom stalls. Although the court awarded Dr. Jew the discriminatorily denied promotion and back pay, she received no remedy for the devastating damage to her professional reputation within the national scientific community she has described, for the resulting difficulties she has encountered in obtaining all-important research grants, and the problems she has faced in finding alternative employment.[12]

Another example is the experience of Curtis Cowan, who was passed up three times for promotion to a managerial position for racially discriminatory reasons. Cowan v. Prudential Ins. Co. of America, 703 F. Supp. 196, aff'd 852 F.2d 688 (2d Cir. 1988). He recovered nothing under Title VII for his injuries,[13] which included emotional distress from being unjustly barred from advancing in the company, because the court determined that he would not have earned more salary in the managerial position during the relevant time period (managers earned a low base pay, and had to build a client base from which they drew greater earnings over time). However, Mr. Cowan was not compensated for the time that he was discriminatorily barred from the managerial position, during which he could have been building a client base and laying the groundwork for future higher earnings. Nor did he receive compensation for the loss of those future earnings.

Similarly, several Jewish anesthesiologists at a university medical school were denied the opportunity to do a rotation at a hospital in Saudi Arabia, where non-Jewish anesthesiologists were sent regularly to study unusual medical problems. Abrams v.

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[12] Dr. Jew did receive a monetary settlement in connection with state claims brought under Iowa law. However, because of Title VII limitations, but for the fortunate accident of her state residence, she would not have had access to any financial relief beyond backpay.

[13] Mr. Cowan did recover $15,000 for his emotional injuries under his #1981 claim.

Baylor College of Medicine, 581 F. Supp. 1570 (S.D. Tex. 1984), *aff'd in part*, *rev'd in part*, 805 F.2d 528 (5th Cir. 1986). This prestigious rotation offered lucrative compensation, attractive benefits, and a professionally valuable clinical experience. Although the Jewish doctors' direct wage injuries were addressed with an award of back pay, they were not "made whole" for the prestigious and valuable professional experience that they lost due to their employer's discrimination and which could well have translated into future higher earnings.

E. *The Lack of Damages Can Bar Individuals Whose Rights Are Violated Under Title VII From Recovering Attorneys Fees*

The lack of availability of damages can defeat an award of attorneys fees even in the face of a demonstrated statutory violation.[14] This is precisely what happened to Hortencia Bohen, the fire dispatcher in the case discussed earlier: she was denied attorneys fees in spite of the fact that the court found she had been the subject of illegal, discriminatory treatment. *Bohen*, *supra* at 1184; *see also* *Swanson*, *supra* at 1240. Without the availability of fees, the great majority of discrimination victims are, as a practical matter, without the means to pursue their claims and vindicate their rights. Again, employers who have clearly violated the statute are able to avoid any liability.

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[14] Some courts have awarded nominal damages to victims who have proven discrimination under Title VII so that they can recover attorneys fees, *see*, *e.g.*, *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 219 (E.D. Va. 1988) (victim awarded $1.00 nominal damages). Other courts have suggested in dicta that Title VII plaintiffs can recover nominal damages for this purpose; *see*, *e.g.*, *Katz v. Dole*, 709 F.2d 251, 253 n.1 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). However, there is a split in the circuits regarding this practice, with the seventh circuit taking the contrary position. *See, e.g.*, *Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989); *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180, 1184 (7th Cir. 1986). *See also* *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 198 (6th Cir. 1978), *cert. den.* 441 U.S. 932 (1979).

III. State Tort Law Does Not Provide a Sufficient Alternative For Title VII Plaintiffs Seeking Damages

Although some discrimination victims have been awarded damages under state tort law, such laws are not satisfactory alternatives to a Title VII damages remedy. First, state tort law was not formulated with the goal of enforcing federal civil rights, and does not lead to such enforcement. Second, tort laws vary widely from state to state. In addition, in a number of states workers' compensation laws effectively bar recovery under tort theories. Full vindication of civil rights should not be dependent on a factor as arbitrary as the victim's place of residence.[15]

Elizabeth Paroline, a word processor, lost her tort claim for intentional infliction of emotional distress because the conduct complained of -- unwanted touching, kissing, and suggestive remarks of her supervisor -- was not "outrageous" enough to sustain the claim. Although she was allowed to go forward with her Title VII claim, the court upheld a summary judgment ruling for the defendant on the tort claim and thus precluded any claim to damages. Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989).

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[15] Similarly, state civil rights laws do not provide satisfactory alternatives to a damages remedy in Title VII; discrimination victims in the majority of states cannot pursue a claim for damages under state anti-discrimination laws. Although some state laws do provide a fuller range of remedies, see, e.g., Contardo v. Merrill Lynch Pierce Fenner & Smith, 1990 WL 217068 (D. Mass.) ($250,000 punitive damages awarded under Massachusetts state law in sex discrimination case where no remedy was available under Title VII), the ability of a discrimination victim to vindicate fully his or her civil rights is far too important to depend on the accident of residence.

Tamara Class also discovered how difficult it is to prove the intentional infliction of emotional distress. Class v. New Jersey Life Insurance Co., 746 F. Supp. 776 (N.D. Ill. 1990). Her supervisor subjected her to numerous sex-related jokes, stories, and innuendos, invited her and two other women to his house for a weekend with the implied purpose of having sex, invited her again to his house alone for the same purpose, asked her whether she swallowed when engaging in oral sex, and described to her and two other female employees the size of his penis. The court found that this behavior was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." The only reason that her claim was not dismissed was that she also alleged retaliation.

It has been equally difficult for discrimination victims to succeed with an invasion of privacy tort claim. Two female shipyard workers, for example, were sexually harassed by their manager, who requested sexual favors from them, made suggestive comments, and asked them to visit him on the couch in his office. Steele v. Offshore Shipbuilders, Inc., 867 F.2d 1311 (11th Cir. 1989). The invasion of privacy count that they filed pendent to their Title VII action was dismissed because the harasser's sexually suggestive comments had been made privately. Publication to the public in general or to a large number of persons was a necessary element of the state tort claim.

Moreover, in a number of states discrimination victims face an additional, virtually Catch-22, problem when they attempt to sue their employers in tort. If their harasser was acting in the scope of employment, the victim may only proceed under the state worker's compensation law where monetary relief is severely limited.[16] If the harasser was not acting in the scope of employment, then the doctrine of respondeat superior prevents the victim from suing the employer, at all, in tort. The victim's only remaining option is to sue the harasser directly, which typically is inadequate as a practical matter because the harasser does not have the financial resources available to remedy the effects of the discrimination.

In Miller v. Lindenwood Female College, 616 F. Supp. 860 (E.D. Mo. 1985), Patsy Miller found herself in precisely this situation when she sued her employer in tort for her supervisor's sexual harassment. In ruling against her on her motion for summary judgment on the tort claim, the court held that Ms. Miller had two options. If her harasser had been acting within the scope of his employment when he harassed her, her only relief lay under worker's compensation law. If he acted as an independent agent, she had no cause of action against her employer, and would have to sue her harasser directly. See also

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[16] The difference between the recovery in tort and worker's compensation is substantial. For example, a California woman who won a tort recovery of nearly $16,000 after her supervisor attempted to rape her would have received only $750 from worker's compensation. Montgomery, Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Action, 10 G.G.U.L. Rev. 879, 920 (1980), citing Doney v. Tambouratgis, 587 P.2d 1160 (Cal. 1979).

Zabkowicz v. West Bend Co., 789 F.2d 540, 543 (7th Cir. 1986) (sexual harassment victim barred by state worker's compensation law from suing employer for intentional infliction of emotional distress); Brooms v. Regal Tube Co., 881 F.2d 412, 426 (7th Cir. 1989) (state worker's compensation law provides exclusive remedy for state law claims).

IV. With Its Damages Remedy, Section 1981 Affords Significantly More Meaningful Remedies For Employment Discrimination Than Are Available Under Title VII

With its damages remedy, §1981 provides significantly more relief to the victims of employment discrimination who can invoke its terms than is afforded under Title VII. However, discrimination victims not covered by § 1981 suffer many of the same harms as §1981 plaintiffs although they do not have access to the same remedies. A comparison of decisions awarding damages under §1981 to victims of race, national origin and religious discrimination and judgments awarding only the much narrower relief available under Title VII to victims of sex discrimination cogently demonstrates the limitations of Title VII's remedial scheme. This is true regarding both compensatory and punitive damages.

Consider, for example, the following cases where courts have found that the plaintiffs were discriminatorily denied promotions. Samuel Richards, a black carpenter, was denied a promotion, despite the fact that he had an educational background more relevant to the job in question than the white man who got the job. Richards v. New York City Bd. of Educ., 668 F. Supp. 259 (S.D.N.Y. 1987), aff'd 842 F.2d 1288 (2d Cir. 1988). In his combined §1981, §1983 and Title VII action, Mr. Richards recovered back pay, was designated for the next promotion, and, pursuant to #1981, received $15,000 in compensatory damages for the emotional distress he suffered.

Richard Stallworth also obtained a full remedy under #1981. Mr. Stallworth was repeatedly passed up for promotion to administrative positions, including school principal, because of his race. Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985). Successful in his combined #1981, #1983 and Title VII action, he recovered back and front pay of $44,090.50. He also recovered $100,000 in compensatory damages for emotional distress. Finally, he recovered $1,000 in punitive damages against the school superintendent who had conducted a sham selection procedure.

Alice Brice recovered $50,000 in compensatory damages and $15,000 in punitive damages for discrimination in violation of #1981. Williams v. Owens-Illinois, Inc., 469 F. Supp. 70 (N.D. Cal. 1979), rev'd in part, aff'd in part, 665 F.2d 918 (9th Cir. 1982), cert. den. 459 U.S. 971 (1982). Ms. Brice was repeatedly passed over for promotions to positions for which she was highly qualified, and was otherwise discriminatorily treated. The compensatory damages were based on a medical and nervous condition she suffered as a result of the discriminatory treatment as well as the resulting consequential injuries in her private life. Ms. Brice was also awarded back pay in an amount to be determined subsequently.

Employees who are the victim of very similar discrimination on the basis of their sex have no claim to monetary remedies similar to those awarded to Mr. Richards, Mr. Stallworth or Ms. Brice. A case in point is Christine Townsend who was also discriminatorily denied a promotion. Townsend v. Washington Metropolitan Area Transit Authority, 746 F. Supp. 178 (D.D.C. 1990). Her employer promoted a "pre-selected" and less qualified male although she received "top ratings" from the personnel office and the selection panel. Moreover, the court found a "discriminatory atmosphere" at the Transit Authority. The court awarded Ms. Townsend a promotion and back pay. Because her claim was limited to Title VII, however, she was entitled to no compensation at all for the emotional distress or any other non-wage injuries she suffered. Nor did her employer have to fear an award of punitive damages to punish it or deter it from future wrongdoing.

Similarly, neither Jean Jew nor Nancy Ezold, whose cases are discussed above, could bring claims for either compensatory or punitive damages in connection with their discriminatorily denied promotions.

The substantial disparity in remedies available to persons who have been victimized by very similar types of discrimination is equally clear in harassment cases. For example, John Ways, a black police officer, was subjected to racially offensive cartoons and remarks at the police station. Ways v. City of Lincoln, 705 F. Supp. 1420 (D. Neb. 1988), aff'd in part, rev'd in part on other grounds, 871 F.2d 750 (8th Cir. 1989). He secured an injunction against future racist behavior, and under

#1981, $35,000 in compensatory damages for his emotional distress from having to work in a racially hostile environment.

Alvin Hunter was also racially harassed by his co-workers, who, for example, posted signs reading, "the KKK is not dead, nigger," and attached a hangman's noose smeared with a black substance to his equipment. Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986). When he complained to his supervisors about the harassment, no steps were taken to remedy the situation. He was subsequently fired in retaliation for complaining. Under #1981 he recovered $25,000 for indignity and stress and $25,000 in punitive damages. He also received back pay under Title VII in an amount to be determined on remand.

Kenny Crawford, a white man who testified to his employer's racial discrimination at an EEOC hearing, was called "just another nigger" by his supervisor, and harassed in retaliation. Crawford v. Roadway Express, 28 Emp. Prac. Dec. ¶32,513 (W.D. La. 1980). He was subjected to oppressive surveillance on the job, and his requests to go to the restroom or get a drink of water were denied. He recovered back pay and interest in the amount of $17,024.95 under Title VII but relied on #1981 to compensate him for the gastrointestinal problems and emotional distress he suffered because of the retaliatory harassment. He received $17,000 in compensatory damages, and an additional $9,793.76 in medical damages.

Victims of equally vicious sex harassment are treated very differently under the law. Jackie Morris, a machinist, suffered through a campaign of harassment where, for example, obscene objects, pictures and notes were placed at her workstation and her equipment was tampered with and stolen. Morris v. American National Can Corp., 52 FEP Cases 213 (E.D. Mo. 1989). Management was notified but did nothing to stop the harassment which eventually caused Ms. Morris to become physically and emotionally ill. Ms. Morris was awarded full Title VII remedies, including back pay for lost wages, but she received nothing for the emotional and physical distress she suffered; nor was any financial punishment imposed on her employer. See also Testimony of Jackie Morris before the House Education and Labor Committee.

Similarly, Lois Robinson was never compensated, nor her employer punished, for the extreme sexual harassment she suffered as a welder at a shipyard. Robinson v. Jacksonville Shipyards, Inc., 1991 U.S. Dist. Lexis 794 (M.D.Fl. 1991). Pictures of nude and partially nude women, including a picture of a woman's pubic area with a meat spatula pressed on it, were posted throughout her workplace. Male co-workers made numerous sexual comments, such as "Hey, pussycat, come here and give me a whiff," and offensive jokes such as one relating to sodomous rape. Graffiti appeared near her work station; one example was "lick me you whore dog bitch." Female co-workers were similarly harassed. Her employers knew of the problem but took no action to stop it. This was in spite of the fact that ship repair is dangerous work and they were fully aware of the particular need for a "work environment that is safe and healthful." Ms. Robinson, who stayed on the job, was awarded only injunctive relief and $1.00 in nominal damages, despite the torment she endured.

Other actual examples of the failure of Title VII's remedies for victims of sexual harassment are provided in the cases discussed above of Virginia Delgado, Betty Sowers, Frances Danna, Carolyn Gaddy, Helen Brooms, Pat Swanson, Carol Zabkowicz, Ramona Arnold, Shirley Huddleston, Theresa Contardo, Johnnie Mae Mitchell, Hortencia Bohen and Jean Jew.

The caselaw also makes it abundantly clear that persons who are discriminatorily discharged from their job on the basis of their race or ethnicity have a much better chance of being made whole for their injuries than are women who are discriminatorily discharged on the basis of their sex. Juanita Reeder-Baker was the victim of racial discrimination when she was wrongfully fired from her position as a production control consultant at a data processing center. Reeder-Baker v. Lincoln Nat. Corp., 649 F. Supp. 647 (N.D. Ind. 1986), aff'd 834 F.2d 1373 (7th Cir. 1987). Following her wrongful termination, Ms. Reeder-Baker suffered emotional, medical, family and financial problems. Pursuant to Title VII, she received back pay and prejudgment interest of $26,709.25 and front pay of $26,760.00. However, the court relied on #1981 to award her $10,000 in compensatory damages for emotional distress and $25,000 in punitive damages.

Darrell Boyd, a black supervisor, was laid off and then not rehired for pretextual reasons; whites with fewer qualifications were rehired. Boyd v. SCM Allied Paper Co., 42 F.E.P. 1643 (N.D.

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Ind. 1986). Pursuant to Title VII, he was reinstated and awarded $17,615.34 in lost wages. Only #1981, however, addressed the humiliation, distress, and loss of self-esteem he suffered when he had to explain to his young son why he was not working. He recovered $5,000 in compensatory damages.

Charles Grubb had been a hospital laundry manager with an exemplary record for 18 years when he was demoted and eventually fired by the hospital's new manager, who stated that a black man had no business supervising white women. Grubb v. Foote Memorial Hospital, 533 F. Supp. 671 (E.D. Mich. 1981), aff'd 759 F.2d 546 (6th Cir. 1985), cert. den. 474 U.S. 946 (1985). Under Title VII, Mr. Grubb received reinstatement, an injunction to prevent further discrimination, and back pay in an amount not specified. Under #1981 he recovered for his emotional distress in the amount of $25,000.

Ina Alston, a black woman originally from Panama, was discriminated against on the basis of her race and national origin. Alston v. Blue Cross and Blue Shield of Greater New York, 37 F.E.P. 1792 (E.D.N.Y. 1985). During her 17 years of employment with the defendant, she was consistently praised in her evaluations and steadily promoted. However, when Ms. Alston discovered that she was being paid several thousand dollars less than the published salary for her position, she was removed from her position. Her manager told her that "people don't know their places" and remarked wistfully that one Panamanian woman he had known, his former maid, customarily greeted him at his door, took off his shoes, and massaged his feet. Under Title VII, Ms. Alston recovered back pay in the amount of $15,838 and front pay of $10,848. She was more fully compensated pursuant to her #1981 claim: she received $25,000 for pain and suffering, and $65,000 for the humiliation she endured.

Finley Muldrew was told he was discharged for excessive absenteeism, but sued his employer because white workers with similar or worse records were not discharged. Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984). Under Title VII, he was reinstated with full seniority. However, it was only through his #1981 action that he received compensation for the consequences of his discriminatory discharge: losing his car and house, and suffering marital and family troubles. He received $125,000 in compensatory damages.

Unlike the foregoing victims of race and national origin discrimination, Cheryl Jones was fired from her job as a laborer on an airport renovation construction project on the basis of her sex. Jones v. Jones Bros. Const. Corp., 879 F.2d 295 (7th Cir. 1989), on remand, 716 F. Supp. 1122 (N.D. Ill. 1989), aff'd, 888 F.2d 1215 (7th Cir. 1989). While Ms. Jones received Title VII remedies, the emotional, medical, family and financial problems she may have suffered as the result of her illegal discharge were legally irrelevant and non-compensable.

Similarly, Virginia Delgado was unable to recover any damages for the injuries resulting from her discriminatory discharge. See discussion above regarding Delgado v. Lehman, 665

F. Supp. 460 (E.D. Va. 1987). Despite Ms. Delgado's best efforts, she was unable to find other employment and suffered extreme financial hardship including permanent injuries to her health. Her recovery, however, was limited to back pay. See also Gaddy v. Abex Corp., 884 F.2d 312 (1989).

These differences are equally apparent in the treatment of remedies in constructive discharge and related cases. Beatrice Williamson relied on #1981 to achieve recovery for the grievous injuries she suffered as the result of employment discrimination. Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987). During her 21 years of employment at Handy Button, Ms. Williamson had watched white workers with less skill and seniority get promoted from the entry-level job she occupied while she was also subject to a variety of other discriminatory acts. She finally left work when her supervisor berated her in loud and scatological language for using the wrong company bathroom. She consequently suffered a depressive disorder which rendered her unable to work. Ms. Williamson recovered a combined award of $130,000 in back and front pay pursuant to her Title VII claim. She also achieved a significant recovery under #1981: she was awarded $100,000 in punitive damages and $20,000 in compensatory damages for her psychological disability and emotional pain and the expenses of medical and psychological treatment.

Betty Sowers, in a case discussed earlier, also suffered a psychological breakdown which left her unable to work as the result of illegal discrimination. *Sowers v. Kemira, Inc.*, 701 F. Supp. 809 (S.D. Ga. 1988). Because she was the victim of sex discrimination, however, unlike Ms. Williamson she had no access to either punitive or compensatory damages. Her remedy was limited to back pay and a time-limited award of front pay which even the judge acknowledged might well be insufficient.

Susan Faust's employer removed her from the position of Human Resources Director, where she had consistently received excellent evaluations, and gave her an "insulting offer for a career-ending demoted position" at a "drastically reduced" earning potential. *Faust v. Hilton Hotels Corp.*, 1990 WL 50419 (E.D.La. 1990) (Magistrate's recommendations) *approved by the court*, 1990 WL 120615 (E.D. La. 1990). She was replaced with a higher-paid male who did very similar work and ultimately quit her job. The court found that the company's explanation that it was upgrading the job was pretextual and determined that Ms. Faust was constructively discharged. Moreover, the court found that Ms. Faust was the victim of pay discrimination; she was paid less than men for equal work. The case was sent back to the magistrate for a determination of remedies. Nonetheless, despite the devastating experience she suffered, Ms. Faust cannot even claim compensatory or punitive damages. She is limited to the Title VII remedies of reinstatement and back pay.

In conclusion, these cases clearly demonstrate that significant damages are awarded under #1981 for injuries not compensable under Title VII.[17]

V. Conclusion

The record is clear. As a direct result of Title VII's failure to provide a damages remedy, the demonstrated injuries of many proven victims of employment discrimination go unredressed. At the same time, employers are not deterred from future discrimination. Further, when seen in light of the damages remedies provided by other federal civil rights laws prohibiting discrimination in employment, this result can only be described as anomalous. To quote again the federal judge in Mitchell v. OsAir, supra,

> There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities she has suffered in private. . . when she is precluded from recovering damages for her perpetrators' behavior. It is, however, the responsibility of Congress, rather than this Court, to recognize and repair this deficiency in the statute. Id. at 643.

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[17] For a review of all damages awards in reported cases under #1981 from 1980 through early 1991, see "Analysis of Damage Awards Under Section 1981" January 23, 1991, prepared by the Washington, D.C. law firm of Shea & Gardner.

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PEOPLE FOR
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Defending Constitutional Liberties

JUSTICE DENIED: THE CONTINUING IMPACT OF THE SUPREME COURT'S 1989 DECISIONS ON TITLE VII OF THE 1964 CIVIL RIGHTS ACT

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March 1991

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Introduction and Summary

Twenty-five years after Congress enacted Title VII of the 1964 Civil Rights Act to protect all Americans from bias in the workplace, the Supreme Court substantially weakened those protections by judicial fiat. In four closely divided rulings in 1989, the Court significantly altered the interpretation of Title VII in a broad range of areas, from rules concerning when job bias cases can be filed to rules relating to final relief.[1] As a report by attorneys and researchers at the law firm of Arnold & Porter and the People for the American Way Action Fund concluded as early as February of 1990, the Court's decisions have had a "substantial cumulative negative impact on the overall effectiveness of Title VII in combatting employment discrimination."[2]

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[1] These decisions include *Lorance* v. *AT&T Technologies*, 490 U.S. 900 (1989); *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989); and *Martin* v. *Wilks*, 490 U.S. 755 (1989). The Court also issued decisions in 1989 in *Independent Federation of Flight Attendants* v. *Zipes*, 491 U.S. 754 (1989), which affects the availability of attorneys' fees in certain employment discrimination cases, and in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), which concerns the interpretation of 42 U.S.C. § 1981. These two decisions do not directly concern the substantive scope of Title VII and are not discussed in this analysis.

[2] People for the American Way Action Fund, *The Overall Impact of the Supreme Court's 1989 Decisions on Title VII of the 1964 Civil Rights Act* (Feb. 1990) ("PFAWAF Report") at 3.

This study was commissioned to update the 1990 PFAWAF Report and to assess the continuing impact of the Court's 1989 decisions on Title VII. As with the previous report, it was conducted by attorneys and researchers at the Washington, D.C., law firm of Arnold & Porter and at the People for the American Way Action Fund. It focuses on decisions citing the Court's rulings which have been rendered in the lower courts in the year following the 1990 PFAWAF Report. In particular, all such decisions between January 12, 1990 (the date through which research was conducted for the 1990 report) and January 13, 1991, were reviewed and analyzed. LEXIS, NEXIS, and other computerized data bases were used in the research.

As discussed more fully below, this analysis has concluded that taken together, the Court's rulings continue to have a significant negative impact on Title VII enforcement. The Court's rulings affect every major stage of a Title VII proceeding: filing a claim, proving it before a court, and securing relief. At each of these stages, the Court's decisions contradict prior case law and have made it significantly more difficult for victims of discrimination to prevail. By erecting substantial new barriers to combatting discrimination, the Court's decisions discourage bias victims from bringing legal challenges and weaken the overall effectiveness of Title VII.

The impact of the Court's decisions begins at the initial stage of job bias claims. In Lorance v. AT&T Technologies, 490 U.S. 900 (1989), the Court held that a claim challenging a discriminatory seniority policy must be brought within 300 days of the policy's adoption, even if employees are not injured or affected until years later. Lower courts have continued to extend Lorance beyond seniority cases to preclude challenges to other types of bias, such as discrimination in promotions and benefits and even age discrimination claims under the Age Discrimination in Employment Act. Due to Lorance, many persons harmed by discriminatory employment rules will never have the chance to challenge them in court.

Once a discrimination victim gets to court, two of the Supreme Court's rulings continue to significantly undermine the ability of victims to prove discrimination. Until the Court's ruling in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), job tests and other practices were held to violate Title VII where they had a substantial disparate impact on women or minorities and where employers could not prove that such practices were justified by business necessity. Wards Cove, however, reversed previously controlling Supreme

Court precedent and ruled that employers no longer have to prove business necessity for discriminatory practices. Instead, the Court ruled, plaintiffs must now prove that such practices are *not* justified by business necessity. As detailed below, *Wards Cove* has continued to require courts to uphold employment practices that would have been struck down as discriminatory before *Wards Cove*, and to discourage bias victims and their lawyers from pursuing disparate impact claims.

Another important way to prove discrimination under Title VII has been to show that an employer treated a plaintiff differently on the basis of race, sex, or other prohibited grounds. Before the Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), the courts held that employers were liable for discriminatory conduct even if other non-discriminatory motives were mixed into their reasons for making job decisions. Accordingly, even if legitimate reasons precluded a court from remedying the discrimination by promoting the employee, for example, an employer who had discriminated would still be liable for bias and could be enjoined from using discriminatory promotion methods in the future. But under *Price Waterhouse*, as long as an employer can prove that it would have made the same employment decision regardless of the discrimination, it can escape liability entirely and courts can take no action to prevent or remedy the discriminatory aspects of the employer's conduct.

Last year's report predicted that this ruling could permit employers guilty of blatant discriminatory conduct to escape Title VII liability altogether. Unfortunately, that prediction has proved quite accurate. In several cases, the courts have ruled that even intentionally discriminatory conduct must be considered legal as a result of Price Waterhouse, further impairing the effectiveness of Title VII.

Finally, the Court's decision in Martin v. Wilks, 490 U.S. 755 (1989), continues to have a negative impact on the relief stage of Title VII cases. Before Wilks, most courts ruled that a consent decree or court order entered in a discrimination case could not be collaterally attacked or challenged in a later case. But in Wilks, the Court opened the door to endless litigation and relitigation by holding that persons who want to challenge such remedies may do so even years after the fact, and even if they sat on the sidelines and did nothing when the relief was originally entered. As a result of Wilks, new challenges to existing job bias remedies continue to be brought, threatening to extend the litigation of Title VII suits almost endlessly and to substantially discourage settlement of such claims.

The balance of this report will analyze in greater detail each of the Court's 1989 Title VII decisions, focusing particularly on how these rulings have affected litigation in the lower courts over the past year. The results of this analysis, coupled with the 1990 PFAWAF Report, compel a clear conclusion: the Court's 1989 decisions have already weakened the effectiveness of Title VII, and threaten to continue to do so in the future.

Lorance v. *AT&T Technologies*

In *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the Supreme Court ruled 5-3 that a claim under Title VII challenging a facially neutral seniority policy, alleged to be intentionally discriminatory, is barred if not brought within 300 days of the policy's adoption. The statute of limitations begins to run from the date of the policy's enactment, the Court held, not from the time the plaintiff is first injured. Due to *Lorance*, plaintiffs now must challenge a facially neutral seniority policy with discriminatory impact at the time of its adoption, which may be long before they ever are injured by such a policy. As Justice Marshall explained in dissent in *Lorance*, the result threatens to effectively insulate many discriminatory seniority systems from attack. *See* 490 U.S. at 919.

The impact of *Lorance*, however, extends far beyond seniority systems. Even as early as last February, the courts had begun to apply *Lorance* to other types of job bias cases, and it was predicted that *Lorance*'s effects would become pervasive.[3] In fact, the disruptive effects predicted in the wake of *Lorance* have begun to be felt. The courts have relied on *Lorance* to limit the ability to bring discrimination claims not only under Title VII, but also under other statutes, most notably the Age Discrimination in Employment Act.

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[3] PFAWAF Report at 8-17.

The Continuing Impact of Lorance

In the time since Lorance was decided, more than a dozen court decisions, most during the last year, have relied on Lorance in holding untimely employment discrimination claims or indicated in *dicta* that the Lorance rationale supports a restrictive approach to statute of limitations issues in employment discrimination cases. These have included both seniority cases as well as decisions concerning other types of job discrimination claims.

A number of courts have applied Lorance over the last year to limit Title VII challenges to seniority policies and systems. For example, the court in Chambers v. Parco Foods, Inc.,[4] relied on Lorance in granting summary judgment against a challenge to a seniority-based system which effectively precluded female workers from obtaining jobs in a higher-paying, predominantly male department and kept female workers confined to a lower-paying, mostly female job category. The plaintiff, Phyllis Chambers, brought her challenge promptly after the policy damaged her. Because the policy itself had been adopted earlier, however, the court dismissed the lawsuit, noting that Lorance compelled such a result even if the system "existed to discriminate against female employees or was enacted for that purpose."[5]

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[4] 1990 U.S. Dist. LEXIS 5840 (N.D. Ind. Jan. 23, 1990).

In addition, the courts have continued to extend Lorance to Title VII claims that do not involve seniority systems. For example, in Beavers v. American Cast Iron Pipe Co.,[6] plaintiffs sued under Title VII for wrongful denial of health insurance coverage and medical services for their children because of their sex and race. The company's benefits plan required that in order to be covered, children must reside full-time with a permanent or full-time or retired employee. The plaintiffs claimed a disparate impact on male employees and their children because women historically have been awarded custody in divorce actions more frequently than men.

The plaintiffs argued that a new violation occurred each time that the company provided health care benefits to the dependent children of female employees while denying those benefits to the children of the plaintiffs. Prior to Lorance, the Court had ruled that the claims were timely under Title VII. After Lorance, however, the court reversed its prior determination. The court ruled that the earlier opinion, rendered prior to the Supreme Court's decision in Lorance, "is not correct following Lorance and it would be error . . . to adhere to it . . . ."[7]

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[5] Id. at *9. See also Banas v. American Airlines, Inc., 1990 U.S. Dist. LEXIS 17170 (N.D. Ill. Dec. 18, 1990); Klimek v. Village of Broadview, 735 F. Supp. 753 (N.D. Ill. 1989).

[6] 1990 U.S. Dist. LEXIS 16143 (N.D. Ala. Nov. 21, 1990).

The court also rejected plaintiffs' argument that Lorance was not controlling because it involved a seniority system. Plaintiffs contended that the Supreme Court's holding expressly recognized the special nature of seniority systems, and thus Lorance should be limited to cases involving seniority systems. The district court, however, was unpersuaded, suggesting that the Supreme Court would have reached the same result in Lorance even if other types of discrimination had been involved. It characterized the Lorance rationale as arising out of a need to balance the interests in protecting valid claims against the interests in barring stale claims. Thus the district court construed Lorance broadly to encompass claims arising out of different factual settings. The message of Beavers is clear -- employment discrimination plaintiffs will face strict time constraints under Lorance, regardless of the type of discrimination involved.

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[7] Id. at *4-5.

Lorance has also had a significant impact on claims brought under the Age Discrimination in Employment Act (ADEA)[8]. For example, Colgan v. Fisher Scientific Co.[9] involved a claim of termination arising from age discrimination. Plaintiff Jack Colgan had worked for Fisher Scientific Co. for nearly 30 years when in January 1986 he was offered and declined an early retirement package. In July 1986, he received a negative performance evaluation. This was the first job appraisal during his tenure at Fisher that concluded with a negative overall evaluation. In December 1986, Colgan was informed that his job was being eliminated and that his employment was terminated. Colgan filed a charge of age discrimination with the Equal Employment Opportunity Commission on July 16, 1987, and filed his lawsuit December 5, 1988.

In holding Colgan's age discrimination claim barred by the 300-day statute of limitations under the ADEA, the court held that the period began to run when Colgan received the unfavorable evaluation, rather than three months later when he was actually discharged. The court stated that relying on the discharge date "would operate to circumvent the relatively short limitations period adopted in the statutory scheme." The court cited the "'disruptive' example rejected by Justice Scalia in Lorance . . . . 109 S. Ct. at 2269."[10] The Colgan court noted that Lorance is a Title VII case but stated that "Title VII precedents are applicable in interpreting ADEA cases concerning timely exhaustion of administrative remedies."[11]

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[8] 29 U.S.C. §§ 621, et seq. Section 17 of the proposed Civil Rights Act of 1991 would apply a similar remedy with respect to the effects of Lorance on the ADEA as Section 7 of the Act would apply to Title VII.

[9] 747 F. Supp. 299 (W.D. Pa. 1990).

Other ADEA cases relying on Lorance to hold plaintiffs' claims time-barred include: Cote v. University of Illinois[12] (continuing violation theory rejected in pay discrimination case arising from layoff and subsequent rehiring at lower salary grade); Barbagallo v. General Motors Corp.[13] (denying motion to add individual and class claims challenging early retirement program and rejecting continuing violation theory); EEOC v. City College of Chicago[14] (holding that where early retirement plan not facially discriminatory, limitations period commences upon adoption of plan); Hamilton v. First Source Bank[15] (rejecting discovery rule for pay discrimination claim and ruling that limitations period commences at time of unlawful act, not upon notice of discriminatory effect or motivation); Davidson v. Board of Governors of State Colleges and Universities for Western Illinois University[16] (rejecting salary discrimination claim where adoption of collective bargaining agreement, rather than injury to plaintiff, held to trigger statute of limitations). For job bias plaintiffs under both Title VII and the ADEA, Lorance continues to have a serious negative impact.[17]

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[10] Id. at 303.

[11] Id. at 301, n.3.

[12] 1990 U.S. Dist. LEXIS 3739 (N.D. Ill. April 3, 1990).

[13] 1990 U.S. Dist. LEXIS 8583 (S.D.N.Y. July 13, 1990).

[14] 740 F. Supp. 508 (N.D. Ill. 1990).

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[15] 1990 U.S. App. LEXIS 22298 (4th Cir. Dec. 27, 1990).

[16] 1990 U.S. App. LEXIS 21550 (7th Cir. Dec. 13, 1990).

[17] Lorance has also been applied under statutes other than Title VII and the ADEA by several courts. See, e.g., Hendrix v. Yazoo City, 911 F.2d 1102 (5th Cir. 1990) (Fair Labor Standards Act); Kuemmerlein v. Madison Metro. School Dist., 894 F.2d 257 (7th Cir. 1990) (42 U.S.C. § 1983); Addison v. Piedmont Aviation, Inc., 745 F. Supp. 343 (M.D.N.C. 1990) (Railway Labor Act).

Wards Cove Packing Co., Inc. v. *Atonio*

In *Wards Cove Packing Co., Inc.* v. *Atonio*,[18] the Supreme Court changed the contours of disparate impact doctrine and effectively overruled its unanimous decision in *Griggs* v. *Duke Power Co.*[19] *Wards Cove* involved a challenge to hiring practices which resulted in a racially stratified workforce where minority workers held primarily low-paying "cannery jobs" and white workers held primarily higher paying "non-cannery jobs." The Supreme Court ruled that such evidence did not establish a *prima facie* case of disparate impact in violation of Title VII.[20] Having determined that the plaintiffs' statistics were not sufficient to show disparate impact, the Court then went beyond the issues necessary to decide the case and fashioned new standards that plaintiffs must satisfy in order to succeed in disparate impact lawsuits.

In defining these additional burdens, *Wards Cove* departed from *Griggs* and its progeny in three significant ways. First, the Court held that the plaintiffs must identify the particular practices that produce disparate impact and prove that each specific practice challenged causes significant disparate impact.[21] This represents a departure from previous disparate impact case law permitting plaintiffs to challenge a group of employment practices that combine to produce a significant disparate impact on minorities or women.[22] *Wards Cove*'s more stringent requirement thwarts Congress' intent in enacting Title VII to target the "'systems' and 'effects'" of employment discrimination, rather than address the problem on a narrow, piecemeal basis.[23]

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[18] 109 S. Ct. 2115 (1989).

[19] 401 U.S. 424 (1971).

[20] The Court held that the statistically valid comparison was between "the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs." *Wards Cove*, 109 S. Ct. at 2121.

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[21] *Id*. at 2125.

[22] *See*, *e.g*., *Green* v. *USX Corp.*, 843 F.2d 1511, 1521 (3d Cir. 1988) (a ruling that a multicomponent system cannot be challenged would be "wholly incompatible with *Griggs*"), *vacated*, 490 U.S. 1103 (1989); *Powers* v. *Alabama Dept. of Educ.*, 854 F.2d 1285 (11th Cir. 1988), *cert*. *denied*, 490 U.S. 1107 (1989) (plaintiffs did not have to isolate the particular aspect of the promotion process responsible for the disparate impact); *Griffin* v. *Carlin*, 755 F.2d 1516, 1523 (11th Cir. 1985); *Segar* v. *Smith*, 738 F.2d 1249, 1270-71 (D.C. Cir. 1984), *cert*. *denied*, 471 U.S. 1115 (1985); *Williams* v. *City and County of San Francisco*, 483 F. Supp. 335 (N.D. Cal. 1979) (plaintiffs need not examine each stage of the selection process to state a *prima facie* disparate impact claim), *reversed without opinion*, 685 F.2d 450 (1979) (9th Cir. 1982).

[23] *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1970); *see also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 16-17 (referring to Title VII as targeting "any measure, combination of measures," etc., which operates to produce discrimination).

Of even greater consequence for victims of discrimination, the Court in *Wards Cove* also revised its interpretation of the business necessity defense, redefining both the scope of the defense and the burden of proof. Although earlier cases had required practices with a disparate impact to be "essential to good job performance,"[24] or "significantly correlated with important elements of work behavior,"[25] *Wards Cove* broadened the defense to enable employers to show simply that the challenged practice "serves, in a significant way, the legitimate employment goals of the employer."[26] In addition, the Court held that the employer need only produce evidence of business necessity, and that the plaintiff bears the burden of persuasion to demonstrate that business necessity does *not* justify the challenged practice.[27] *Griggs* and its progeny had placed the burden of proof as to business necessity squarely on the defendant.[28] The combination of the Court's transformation of the defense from business necessity to a "reasoned review of the employer's justification,"[29] and its requirement that plaintiffs prove its nonexistence, makes "business necessity"[30] the exception that swallows the rule prohibiting unlawful disparate impact.[31]

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[24] *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 (1977).

[25] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975).

[26] 109 S. Ct. at 2125-26.

[27] In effecting such a tremendous change in disparate impact law, the majority contended that the plaintiff had always had the burden of persuasion to disprove business necessity. *Wards Cove*, 109 S. Ct. at 2126. However, as Justice Stevens observed in a strongly worded dissent, the Court's previous cases belie such an assertion. *See Wards Cove*, 109 S. Ct. at 2130-32 (Stevens, J., dissenting). Read in this light, the majority's later concession -- "We acknowledge that some of our earlier decisions can be read as suggesting
[Footnote continued on next page]

[Footnote continued from previous page] otherwise," Wards Cove, 109 S. Ct. at 2126 -- is clearly an understatement.

[28] See Griggs, 401 U.S. at 432 (". . . Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."). Subsequent Supreme Court decisions consistently discuss the requirements of business necessity in terms of the employer's burden. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Connecticut v. Teal, 457 U.S. 440, 446 (1982); see also Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1210 (1982); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir.), cert. denied, 429 U.S. 861 (1976).

[29] Wards Cove, 109 S. Ct. at 2126.

[30] See Allen v. Seidman, 881 F.2d 375, 381 (7th Cir. 1989) (stating that after Wards Cove, the business necessity defense is a misnomer).

[31] Although a plaintiff who cannot disprove business necessary may still prevail by showing that an alternative selection practice with less disparate impact would equally serve the employer's goals, the Wards Cove Court suggested that even minimal differences in cost and other burdens may preclude such a determination. See Wards Cove, 109 S. Ct. at 2127.

A. *The Initial Impact of Wards Cove*

Both courts and commentators have recognized that *Wards Cove* effected a tremendous change in the law of disparate impact. In a Seventh Circuit case, conservative appellate court judge Richard Posner stated that *Wards Cove* "modified the ground rules that most lower courts had followed in disparate-impact cases,"[32] and suggested renaming the business necessity defense "the issue of legitimate employer purpose" to reflect *Wards Cove*'s dramatic change in the law.[33] The Third Circuit described *Wards Cove* as creating "significant changes in employment discrimination law,"[34] and the Eleventh Circuit read the case as having overruled the existing law in the circuit on business necessity.[35] Other courts have reached similar conclusions.[36] As one commentator has observed, Wards Cove is "a decision that stands in stark contrast to the more than eighteen years of precedent that it threatens to overturn."[37]

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[32] *Allen* v. *Seidman*, 881 F.2d 375, 377 (7th Cir. 1989).

[33] *Id*. at 381.

[34] *See* *Green* v. *USX Corp.*, 896 F.2d 801, 804 (3d Cir. 1990).

[35] *See* *Hill* v. *Seaboard Coast Line Railroad Co.*, 885 F.2d 804, 812 (11th Cir. 1989).

[36] *See*, *e.g.*, *Hinton* v. *Bd of Trustees*, 53 Fair Empl. Prac. Cas. (BNA) 1475, 1478 (N.D. Ill. 1990) (stating that *Wards Cove* "changed prior law [so] that the defendant's burden at the 'justification' stage is one of production only"); *Sledge* v. *J.P. Stevens & Co.*, 52 Empl. Prac. Dec. (CCH) ¶ 39,537, at 60,496 (E.D.N.C. 1990) ("[a]s a result of *Wards Cove* we now know . . . that in the face of a *prima facie* case the employer's burden, even in a disparate impact case, is simply one of production and not of proof.").

The 1990 PFAWAF Report documented the immediate effects of these changes and discussed several cases where Wards Cove's business necessity analysis had already harmed Title VII plaintiffs. In 1989, for example, two Seventh Circuit decisions vacated and remanded lower court rulings that had invalidated discriminatory employment practices because of Wards Cove's business necessity changes,[38] and a Fifth Circuit case relied on Wards Cove to find an employment practice with a clear disparate impact on minorities justified by business necessity.[39] The Report also discussed two district court cases decided in 1989 where courts relied on Wards Cove to uphold the challenged practices.[40]

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[37] Reed, "The Immediate Fallout of Wards Cove," N.Y.L.S. of Human Rights 65 (1990). See also Freilich, Kieler & Johnson, "Reagan's Legacy: A Conservative Majority Rules on Civil Rights, Civil Liberties and State and Local Government Issues," 21 Urb. Law. 633, 647 (1990) (" . . . in disparate impact cases like Wards Cove, the Court reversed its previous policies and raised new barriers to discrimination suits."); Leonard, San Jose Mercury News, July 3, 1989, at 1C (noting that lawsuits challenging systemic discrimination under Griggs "are exactly the cases that have had the wind taken out of their sails" by Wards Cove).

[38] See Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989); Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989), reh'g denied, 1989 U.S. App. LEXIS 13138.

[39] See Bernard v. Gulf Oil Corp., 890 F.2d 735 (5th Cir. 1989).

B. The Continuing Impact of Wards Cove

Based on these early examples, the 1990 PFAWAF Report predicted that disparate impact cases would be less likely to be brought and to succeed in the post-Wards Cove era. Since the Report was released, subsequent research has borne out this prediction. Wards Cove has had a significant impact on disparate impact litigation in the lower courts. In many instances, employees and their lawyers have been deterred from bringing disparate impact lawsuits due to the stringent standards of proof imposed on plaintiffs by Wards Cove. Where employees have brought lawsuits challenging employment practices that disproportionately disadvantage women and minorities, Wards Cove presents obstacles to their success. Discussed below are seven recent cases -- four appellate court and three district court decisions -- where Wards Cove has significantly affected the outcome or analysis in the case. The overall effect of Wards Cove is to make employment practices which harm women and minorities in the workplace less susceptible to successful legal challenge.

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[40] See PFAWAF Report at 30-34 (discussing EEOC v. Carolina Freight Carriers Corp., 51 Fair Empl. Prac. Cas. (BNA) 364 (S.D. Fla. 1989), and Lu v. Woods, 717 F. Supp. 886 (D.D.C. 1989)).

1. Wards Cove and Business Necessity

Wards Cove's reinterpretation of the business necessity defense has had a pronounced impact in the lower courts, making it much easier for employers to justify practices which adversely affect women and minorities. Recent cases in both the courts of appeals and the district courts illustrate the Court's broadening of the business necessity defense.

In Police Officers for Equal Rights v. City of Columbus,[41] (P.O.E.R.), the Sixth Circuit affirmed the district court's ruling for the defendants, finding the Police Department's promotion practices sufficiently job-related under Wards Cove. In P.O.E.R., the challenged exam had close to a 90% pass rate for white officers and less than a 50% pass rate for black officers.[42] The plaintiffs challenged the exam under a court order requiring the Department to remedy its earlier practices found unlawful in prior litigation, which included an order establishing a mechanism to review future exams with an adverse impact on black workers to determine whether they are job-related. The court's pre-Wards Cove order provided that if exams have a disparate impact on blacks, "defendants must show that they are job-related."[43] After Wards Cove, however, the district court amended the order to define business necessity in accordance with Wards Cove, and limited the defendant's burden of proof to the burden of producing evidence of job-relatedness.

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[41] 916 F.2d 1092 (6th Cir. 1990), reh'g denied en banc, 1990 U.S. App. LEXIS 22044.

[42] The pass rate for black officers was 54% of the pass rate for white officers. See P.O.E.R. v. Columbus, No. C2-78-394, Opinion and Order at 8 (S.D. Ohio 1990). Under the Uniform Guidelines, significant disparate impact exists as a general rule wherever the selection rate for one group is 80% of the selection rate for another group.

After the district court received evidence that the Department's promotion exams had a significant disparate impact, it proceeded to evaluate the job-relatedness of the challenged exams under the revised Wards Cove standard. The black officers alleged that the exams tested knowledge only, and did not test for supervisory skills and behaviors critical to the job. The Sixth Circuit affirmed the district court's rejection of this argument on the grounds that "being able to do something requires knowing how to do it."[44] This analysis is noticeably more lax than pre-Wards Cove cases, which had invalidated tests that did not measure the skills necessary to perform the job.[45] The Sixth Circuit also invoked lenient analysis to uphold the focus on knowledge in the job analysis used to prepare the exams, holding that job attributes need not be tested in proportion to their importance and frequency of use. Pre-Wards Cove cases had required selection exams to test attributes proportionate to their importance on the job in order to justify their disparate impact.[46]

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[43] See P.O.E.R. v. Columbus, No. C2-78-394, Opinion and Order (S.D. Ohio 1990).

[44] 916 F.2d at 1098.

The Sixth Circuit also upheld the use of exam questions derived from an outside textbook on police management that was not used as a manual or reference by the Columbus police department.[47] Citing no evidence that success on the exam questions correlated with successful job performance, the district court defended the use of the textbook questions, stating that it found the textbook "well-written and informative," and containing information "which would appear to be useful to a police lieutenant . . . ."[48] Such a practice could well have been struck down under *Griggs*, which required an *actual* relationship between job performance and the practices challenged, rather than mere speculation by a court or employer.[49] The court's rationale in the Columbus case represents a major departure from the careful scrutiny of discriminatory practices required by the Supreme Court in *Griggs*.

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[45] See Firefighters Institute for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977), cert. denied, 434 U.S. 819 (1977).

[46] See, e.g., United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978).

[47] It was undisputed that the text referred to principles, procedures and terminology "not necessarily used" by the Department. P.O.E.R., 916 F.2d at 1101.

[48] Id.

Another Sixth Circuit case, *Abbott* v. *Federal Forge, Inc.*,[50] also illustrates the more lenient analysis employed by courts to justify disparate impact after *Wards Cove*. In *Abbott*, the court upheld the company's moratorium on rehiring workers who had been laid off after a plant closing. The laid-off workers brought an age discrimination disparate impact lawsuit against the company, arguing that the workers affected by the moratorium included a larger percentage of workers over 40 than the workers actually hired. The company argued that the moratorium on hiring laid-off workers served its interest in avoiding the possibility of paying additional seniority pension benefits.

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[49] *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971);. *see also Watkins* v. *Scott Paper Co.*, 530 F.2d 1159 (11th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976) (stating that the burden of validating an examination must be borne by the employer if the employer desires to use a test which operates discriminatorily). Before *Wards Cove*, the use of an exam to train employees for the jobs at issue did not suffice to validate an exam without regard to the test's ability to predict job performance. *See Ensley Branch of NAACP* v. *Seibels*, 616 F.2d 812 (5th Cir. 1980) (mere relationship between exam and success in job training program did not validate exam without respect to test's ability to predict job performance where the exam does not test for the minimum amount of knowledge necessary to complete the training program, where only those with the highest ranked score are selected, and where no evidence demonstrates that higher scores correlate with higher performance), *cert. denied*, 449 U.S. 1061 (1980); *United States* v. *Virginia*, 620 F.2d 1018 (4th Cir. 1980), *cert. denied*, 449 U.S. 1021 (1980) (requiring more than mere correlation between employment practice and job training program).

[50] 912 F.2d 867 (6th Cir. 1990).

Citing Wards Cove, the court upheld the moratorium on business necessity grounds, ruling that minimizing the cost of labor by avoiding paying pension benefits is a legitimate business consideration. Although the court also accepted the alternative rationale that the plaintiffs' statistics did not prove disparate impact, the case illustrates Wards Cove's broadened business necessity analysis. Before Wards Cove, a court probably would not have interpreted business necessity to include an interest in hiring predominantly younger workers with no entitlement to seniority benefits.

One district court had found a company's business practice unlawful before Wards Cove, only to reverse itself after Wards Cove. In EEOC v. O & G Spring and Wire Forms Specialty Co.,[51] the EEOC challenged both the use of word-of-mouth recruitment to hire unskilled workers as unlawful disparate impact, and the practice of hiring walk-ins off the street as unlawful disparate treatment. O & G had employed no black workers between the years 1979 to 1985.[52] In 1988, before *Wards Cove*, the district court found both practices unlawful, dismissing the company's proffered business justification as insufficient to overcome "the 'inexorable zero' employment of blacks by O & G during the years 1979 through 1985.[53] After the Supreme Court decided *Wards Cove*, the district court reversed its ruling as to disparate impact, and held that the plaintiffs had not disproved the business necessity of the recruitment practice. Although the court did uphold its earlier finding that the company's hiring of walk-ins constituted unlawful disparate treatment, O & G's reliance on word-of-mouth recruitment, which has a proven significant disparate impact on minorities, and which was invalidated before *Wards Cove*, is now perfectly lawful. The court's acceptance of the company's rationale that the practice provided a "ready source of employees . . . willing to work at low pay and under poor conditions,"[54] represents a clear departure from *Griggs*' interpretation of business necessity.

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[51] 732 F. Supp. 72 (N.D. Ill. 1990).

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[52] The company's few current black employees were hired in response to the lawsuits.

[53] 705 F. Supp. 400, 406 (N.D. Ill. 1988). O & G had defended the practice on the grounds that it cost no money, it produced workers willing to work under poor conditions for low pay, and it provided workers with skills not needed for the jobs at issue who could later be promoted without formal training.

Wards Cove's business necessity analysis also disadvantaged the plaintiffs in *Hinton* v. *Bd. of Trustees*, who were denied a trial on the issue of business necessity because of *Wards Cove*'s shift in the burden of proof.[55] In *Hinton*, budgetary constraints had caused the employer hospital to terminate over 200 positions, with predominantly black licensed practical nurses (LPNs), rather than predominantly white registered nurses (RNs), bearing the brunt of the layoffs. Assuming that the plaintiffs had established a *prima facie* case of disparate impact against blacks, the district court nevertheless granted summary judgment for the defendants on the grounds that the plaintiffs did not satisfy their burden to disprove business necessity.

The plaintiffs presented evidence that the workforce reductions did not in fact result in any budgetary savings because the number of newly hired RNs almost equaled the number of LPNs laid off, and the newly hired RNs were paid higher salaries. However, the court accepted at face value the hospital's justification that terminating the LPN positions decreased its budget deficit, and that RNs can perform some functions that LPN's cannot, and found the plaintiffs' arguments insufficient to justify a trial under Wards Cove, which "changed prior law [so] that the defendant's burden at the 'justification' stage is one of production only."[56]

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[54] 732 F. Supp. at 74.

[55] 53 Fair Empl. Prac. Cas (BNA) 1475 (N.D. Ill. 1990).

The Justice Department's own litigation tactics also demonstrate Wards Cove's change in the standards for proving business necessity. Much of the Justice Department's Title VII litigation involves the enforcement of consent decrees requiring defendants to develop nondiscriminatory selection procedures. The consent decrees typically provide that if the new procedures have a disparate impact against women or minorities, the defendants must demonstrate their validity under the Uniform Guidelines on Employee Selection Procedures.[57] After the Supreme Court decided Wards Cove, the Justice Department has argued that pre-Wards Cove law, and not the Court's standards in Wards Cove, should govern the validity of the new selection procedures that have a disparate impact.[58] The reason for its position is clear: the Justice Department will be much more likely to succeed in challenging the validity of the procedures under pre-Wards Cove standards of business necessity. As these examples illustrate, Wards Cove has replaced Griggs' business necessity requirements with a much more lenient standard, imposing significant new barriers for plaintiffs in disparate impact cases.

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[56] Id. at 1478.

[57] 29 C.F.R. § 1607.1.

2. Wards Cove and Particularity

Wards Cove's requirement that plaintiffs prove that a particular employment practice caused disparate impact has hampered the ability of plaintiffs to establish prima facie disparate impact. Decisions in both the Sixth and Seventh Circuits illustrate the difficulty created by the requirement that plaintiffs attribute significant disparate impact to each employment practice challenged, rather than a group of practices in general.

In United Assoc. of Black Landscapers v. City of Milwaukee,[59] a class of black employees challenged the promotion practices in the City's Bureau of Forestry that had resulted in no minority employment in any of the Bureau's 50 supervisory positions available over the course of the Bureau's history.[60] The plaintiffs argued that the Bureau's promotion practices of written tests, combined with subjective oral interviews, resulted in a significant disparate impact against minority candidates. However, the plaintiffs never had the chance to try their case in court. The district court dismissed the case without a trial on the grounds that the plaintiffs had failed to identify the specific promotional practices causing the racial disparity, and had failed to make the stringent statistical comparison required by Wards Cove.[61] The Seventh Circuit affirmed the district court's dismissal on the grounds that Wards Cove required the plaintiffs to "'isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities."[62] As Black Landscapers illustrates, Wards Cove's requirement that employees prove that each specific employment practice causes significant disparate impact greatly increases the plaintiffs' difficulty in producing the proof necessary to bring disparate impact claims to trial.

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[58] See, e.g., Updated 1989 Memorandum of the United States in Support of Motion to Terminate Interim Hiring Goals at 4, filed in United States v. City of Buffalo, C.A. No. 73-414 (W.D.N.Y. 1989).

[59] 736 F. Supp. 206 (E.D. Wis. 1990), aff'd, 916 F.2d 1261 (7th Cir. 1990).

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[60] See Affidavit of Eddie J. Martin, Jr., United Assoc. of Black Landscapers v. City of Milwaukee, Nos. 88-C-1144, 88-C-1336 (Jan. 12, 1990).

[61] 736 F. Supp. 206 (E.D. Wis. 1990), aff'd, 916 F.2d 1261 (7th Cir. 1990).

[62] 916 F.2d 1261, 1264 (7th Cir. 1990) (quoting Wards Cove, 109 S. Ct. at 2124) (emphasis in original).

A case in the Sixth Circuit suggests that Wards Cove may even require plaintiffs to prove which particular exam question caused the significant disparate impact in order to challenge an examination which operates to the disadvantage of women or minorities. In Black Law Enforcement Officers Assoc. v. City of Akron,[63] (B.L.E.O.A.), black police officers argued that the city's promotion practices had a disparate impact on black officers. The Akron Police Department had been found guilty of intentional discrimination in earlier litigation,[64] and still had only two black supervisors out of 99 supervisory positions.[65]

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[63] Nos. C84-2974A, C85-2781A (N.D. Ohio 1990).

[64] See Arnold v. Ray, Memorandum Opinion and Order (N.D. Ohio Dec. 11, 1979).

[65] The two black supervisors had been temporarily promoted under court order in 1985. If the court had not intervened, no black officers would have been promoted. See Black Law Enforcement Officers Assoc. v. City of Akron, 824 F.2d 475 (6th Cir. 1987). The plaintiffs challenged the promotion system based on the doctrine that a bottomline "balanced" workforce achieved through court order does not legitimate a selection practice with a disparate impact on minorities. See Connecticut v. Teal, 457 U.S. 440 (1982).

The plaintiffs challenged the Department's practice of promoting a limited number of the highest ranked candidates based on a promotion examination. The district court rejected the challenge on the grounds that Wards Cove requires plaintiffs to identify the specific employment practice challenged and prove that each challenged practice caused significant disparate impact.[66] The Sixth Circuit affirmed in an unpublished opinion requiring the plaintiffs to do more than demonstrate significant adverse disparate impact on the number of black officers promoted based on a rank-ordered promotion exam.[67] The court held that in order to establish a prima facie case the plaintiffs must also pinpoint the particular question or component of the exam causing the disparate impact, citing Wards Cove for the proposition that plaintiffs must "show that a particular component of the examination accounts for the disparate impact."[68]

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[66] See B.L.E.O.A., Nos. C84-2974A, C85-2781A, Memorandum Opinion at 28 (N.D. Ohio).

[67] 1990 U.S. App. LEXIS 21742 (6th Cir. Dec. 11, 1990).

[68] Id. at *11 (citing Wards Cove, 109 S. Ct. at 2124). The plaintiffs had attempted to attribute the disparate impact to a particular component of the exam by proving that the Department assigned black officers only to cases with black witnesses or suspects. The plaintiffs argued that the Department's differential assignments caused black officers to score lower on the job knowledge component of the exam. The plaintiffs

[Footnote continued on next page]

The Justice Department has also argued that Wards Cove requires plaintiffs to pinpoint the particular component of a selection test that results in disparate impact.[69] Although the Seventh Circuit rejected this argument,[70] the Sixth Circuit's decision in B.L.E.O.A. indicates that Wards Cove makes such a restrictive approach a very real possibility. This unprecedented requirement that plaintiffs attribute significant disparate impact to particular components of an exam, and perhaps even individual questions, would make disparate impact challenges of objective examinations virtually impossible.

Wards Cove's particularity requirement may also pose insurmountable problems for disparate impact challenges to subjective employment practices, as illustrated by the Justice Department's arguments in

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[Footnote continued from previous page] presented anecdotal evidence of the limited assignments and literature linking such assignments to poorer exam performance, but the plaintiffs could not statistically prove that the poorer exam performance resulted from the assignment practice because the Department had no records of the relevant assignments. The Sixth Circuit held that because the plaintiffs could not link the assignment patterns to any particular exam questions, even though the inability to do so was at least in part due to the defendant's failure to keep records, the plaintiffs had not met their burden of proving a prima facie case. Id. at *12-13.

[69] See Allen v. Seidman, 881 F.2d at 381.

[70] See id.

Cook v. Billington, a disparate impact case against the Library of Congress. In Cook, the Justice Department argued that the plaintiffs' class action lawsuit should not proceed after Wards Cove because Wards Cove prevents plaintiffs from using disparate impact theory to challenge subjective practices unless they identify a precise mechanism for rigid and uniform discrimination.[71] This standard would make the type of discrimination alleged in Cook -- the subjective, constantly changing manipulation of selection criteria -- virtually immune from disparate impact challenge. As these examples indicate, Wards Cove has greatly inhibited the ability of plaintiffs to prove disparate impact, and may have an even greater negative impact in the future.

C. Conclusion

The above decisions indicate Wards Cove's striking impact on disparate impact lawsuits in the lower courts. Both by significantly weakening the business necessity standard and by imposing strict new particularity requirements, Wards Cove has made it substantially harder to successfully challenge employment practices with discriminatory impact on women or minorities. What these specific cases do not disclose is the propensity for Wards Cove to deter victims of discrimination from ever bringing disparate impact challenges to court. As one commentator has observed, Wards Cove has "drastically increased the difficulty of proving a disparate impact case, and rendered some kinds of employment practices virtually immune from disparate impact analysis."[72] The result will inevitably be to discourage bias victims and lawyers from even filing disparate impact cases, producing a serious "chilling effect on the aspirations of racial minorities and women."[73]

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[71] See Motion to Decertify the Class, No. 82-0400 (D.D.C., motion filed June 20, 1990).

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[72] Holdemand, "Civil Rights In Employment: The New Generation," 67 Den. U.L. Rev. 1 (1990).

[73] Rabinove, "Major United States Supreme Court Civil Rights and Affirmative Action Decisions," N.Y.S.L. J. of Human Rights 9, 31 (1990).

Price Waterhouse v. Hopkins

The Supreme Court's decision in Price Waterhouse v. Hopkins[74] has already begun to have a significant adverse impact on workers who may be victimized by discrimination. The language of Price Waterhouse and subsequent lower court decisions indicate that even blatant discrimination may now be legal under Title VII when a defendant demonstrates it would have made the same specific employment decision in the absence of discrimination. Therefore, discriminatory employers can avoid discrimination liability altogether in some cases, seriously impairing the ability of Title VII to eradicate discrimination in the workplace.

Before Price Waterhouse, the courts had held that employers were always liable for intentional discrimination, even if legitimate motives were mixed with unlawful bias in making an employment decision, such as refusing to promote an employee. While employees could not obtain a promotion as a remedy in a Title VII case if non-discriminatory reasons would have prevented their promotion even in the absence of bias, courts in such cases did find the discrimination unlawful and could order the employer to stop discriminating in the future and to pay the plaintiff's attorney's fees.[75] Indeed, in its brief in *Price Waterhouse* itself, the Reagan Justice Department stated that where non-discriminatory factors would have resulted in the same employment action in the absence of bias, the proper remedy is "an award of attorney's fees and an injunction against future discrimination."[76]

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[74] 490 U.S. 228 (1989).

In *Price Waterhouse*, however, the Supreme Court ruled that even where an employee proves that a job action was undertaken for discriminatory reasons, the employer "may avoid a finding of liability" altogether by showing that it would have made the same decision in the absence of the discriminatory motive.[77] This effectively means that an employer may continue to use discriminatory job practices, which may affect many employees, in some cases.

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[75] *See, e.g.*, *Bibbs* v. *Block*, 778 F.2d 1318 (8th Cir. 1985); *King* v. *Transworld Airlines, Inc.*, 738 F.2d 255 (8th Cir. 1984); *Ostroff* v. *Employment Exchange, Inc.*, 683 F.2d 302 (9th Cir. 1982); *Nanty* v. *Barrows Co.*, 660 F.2d 302 (9th Cir. 1981); *Roberts* v. *Fri*, 29 Fair Empl. Prac. Cases 1445 (D.D.C. 1980); *see also* EEOC Commission Decision Nos. 70-925, 72-0591, 72-0606, CCH EEOC Decisions (1973) Paras. 6158, 6314, 6310; Commission Decision Nos. 75-007 and 75-091, CCH EEOC Decisions (1983) Paras. 6436, 6528 (supporting the position that a finding of invidious motivation is dispositive of Title VII liability, leaving open only the scope of appropriate remedy).

[76] *See* Brief for the United States as *Amicus Curie* at 24, *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (No. 87-1167) (citations omitted).

[77] *Id*. at 244.

Based on the *Price Waterhouse* holding, the lower courts have had to employ a test that effectively allows some discriminatory employers to skirt liability. First, the plaintiff must produce direct evidence that the employer acted with a discriminatory motive. Second, if the court accepts this evidence, the "defendant must prove by a preponderance of the evidence that the defendant would have reached the same decision without the factor proved." If the plaintiff cannot then show that the discriminatory motives were not the prevailing consideration, the courts must find for the employer.[78] Therefore, once a plaintiff proves discrimination, the defendant may avoid all liability by showing that it would have taken the same action in the absence of discrimination.

The *Price Waterhouse* holding has already had an adverse effect in a number of specific cases. For example, in *E.E.O.C.* v. *Alton Packaging Corp.*,[79] Otis Felton, a black man, was passed over for a promotion despite his publicly recognized good work and various pay increases. A white man from outside the company filled the position. Robert Raymond and Robert Diesen made the hiring decision. At trial, Robert Raymond stated that "if it was his company, he wouldn't hire any black people." Another black employee also testified that Robert Diesen had yelled at him "___ ____ it, you people can't do a _______ thing right."[80]

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[78] *See, e.g.*, *E.E.O.C.* v. *Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990); *Burns* v. *Gadsden State Community College*, 908 F.2d 1512, 1518 (11th Cir. 1990); *Visser* v. *Packer Eng'g Assocs., Inc.*, 909 F.2d 959, 961 (7th Cir. 1990).

[79] 901 F.2d 920 (11th Cir. 1990).

Although these discriminatory statements were proven at trial, the lower court found, and the circuit court upheld, that a "preponderance of the evidence indicates that Alton would not have promoted Felton even without the discriminatory reasons."[81] The court found for the defendant and absolved it of any liability. In other words, because of Price Waterhouse, the same two managers proven to have operated with discriminatory motives can continue to make promotion decisions affecting black employees.

In another case, Pajic v. CIGNA Corp.,[82] the plaintiffs had the same difficulty as Felton. The plaintiffs in this case proved a prima facie case of retaliatory discrimination, but the court also found the defendant met its burden of showing a legitimate, non-discriminatory explanation for its treatment of the plaintiffs. Therefore, the court found CIGNA had no discrimination liability.

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[80] Id. at 922.

[81] Id. at 925.

[82] 1990 U.S. Dist. LEXIS 16278 (E.D. Pa. Nov. 30, 1990).

In Pajic the plaintiffs, two women, showed (1) they had been unfairly restricted in their salary increases, (2) they were subjected to adverse employment actions and (3) their supervisor referred to women in the office as "broads, bimbos and glorified secretaries."[83] Based upon these findings the court concluded they had established a prima facie case of retaliatory discrimination.

However, the court also found that CIGNA presented several non-discriminatory reasons why plaintiffs' salaries were restricted and why they were subject to adverse employment actions. Therefore, the court held that the plaintiffs did not sustain the ultimate burden of proof that they were discriminated against. In other words, as a result of Price Waterhouse, the employer in Pajic intentionally discriminated against female employees, but escaped any liability whatsoever.[84]

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[83] Id. at *8.

[84] Price Waterhouse has had a similar impact in other cases as well. See, e.g., Gautier v. Watkins, 747 F. Supp. 82 (D.D.C. 1990) (accepting EEOC finding that an impermissible racial motive contributed to employment decision but ruling for defendant under Price Waterhouse); Brown v. Amoco Production Co., 1989 U.S. Dist. LEXIS 8952 (E.D. Cal. July 31, 1989) (finding that

[Footnote continued on next page]

Of course, plaintiffs who bring discrimination charges in cases involving "mixed motives" can still prevail where the employer cannot bear its burden of proof under Price Waterhouse. Indeed, both before and after the Court's decision, many plaintiffs have won such cases. But this does not mitigate the harmful impact of Price Waterhouse: where employers can show they would have made the same job decision in the absence of discrimination, the Court's ruling effectively legalizes even blatant discrimination and precludes the courts from even ordering the discrimination to cease. The risk that Price Waterhouse will make it impossible for the courts to provide any remedy at all in some "mixed motive" cases, moreover, may well deter bias victims from even challenging discrimination in many cases, further impeding the ability of Title VII to prevent and combat bias in the workplace.

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improper racial motive may have played a role in decision to terminate white employee but ruling for defendant under Price Waterhouse).

Martin v. Wilks

In its decision in Martin v. Wilks, 490 U.S. 755 (1989), the Supreme Court ruled that consent decrees and court-ordered remedies in job bias cases can be challenged at any time, even years after they are entered, by anyone who claims to be affected by them. The Court's holding rejected the overwhelming majority rule in the courts before Wilks that such collateral attacks are impermissible. As a result of Wilks, long-resolved cases are subject to repetitive challenge even by persons who knowingly chose not to participate when the remedy was entered.

The 1990 PFAWAF Report found that Wilks had already had a disruptive effect in the courts. At least 14 new challenges to job discrimination remedies had been filed relying on Wilks by February 1990, and courts had permitted previously filed challenges to proceed as a result of Wilks in several more cases. PFAWAF Report at 49-61. The report concluded that Wilks would substantially impair the ability to obtain stable and effective relief in Title VII cases, both because of its disruptive effect in previous cases and because it would discourage settlement in future cases. Id. at 46, 60-61. As commentators have noted, Wilks means there is significantly less incentive to "buy peace" through settlement because the peace obtained by entering into a consent decree is so easily disrupted. *See* *Chicago Tribune* (June 20, 1989) (quoting EEOC Attorney John Rowe).

The Continuing Impact of Wilks

Experience over the last year has reinforced the conclusion of the PFAWAF Report concerning the disruptive impact of *Wilks*. Although it is difficult to compile a comprehensive list of challenges under *Wilks* until a court decision is reported, research has revealed at least 11 additional cases where courts have permitted such challenges under *Wilks* or where such challenges have been filed.

For example, members of the Chicago Fire Department brought claims in federal district court alleging that the Chicago Fire Department's promotional decisions subjected them to reverse discrimination in violation of the Equal Protection Clause. The Fire Department argued that the complaint was directed at actions in compliance with a settlement agreement under court order. The court rejected the Department's claims, ruling that under *Martin* v. *Wilks*, the plaintiffs' action was not barred by the court-entered order because the plaintiffs had not joined in the agreement.[85]

In a suit attacking the selection process for promotion of police officers, the City of Bridgeport, Conn., defended its promotional decisions as complying with an agreement entered into in settlement of prior litigation. The court decided that the City's defense was entitled to little weight because many of the plaintiffs were not parties to the consent decree. The opinion cites Martin v. Wilks for the principle that non-parties to a consent decree resolving a Title VII case may fully challenge, beyond the narrow grounds normally available for such a collateral attack, employment decisions taken pursuant to it.[86]

The Eleventh Circuit held that a plaintiff was not bound by a consent decree entered into between the plaintiff's employer and the EEOC if the plaintiff was not a party to the decree or did not have sufficient identity of interests with the party entering into the consent decree.[87] The court cited Wilks for the proposition underlying this reasoning that a plaintiff was not bound by a consent decree negotiated between the employer and another group of employees. Wilks, in effect, enabled the court to state that a generally applied program instituting equal employment opportunities in the workplace did not foreclose the ability of an individual who was not directly a party to the agreement to seek additional remedies. The plaintiff's cause of action was a sex discrimination charge under Title VII of the Civil Rights Act.

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[85] Chicago Fire Fighters v. Washington, 736 F. Supp. 923, 927 n.4 (N.D. Ill. 1990).

[86] Bridgeport Guardians, Inc. v. City of Bridgeport, 735 F. Supp. 1126, 1133 (D. Conn. 1990).

[87] Riddle v. Cerro Wire and Cable Group, Inc., 902 F.2d 918, 921-22 (11th Cir. 1990).

A consent decree entered into between a state board of education in a class action lawsuit did not bar a plaintiff from bringing suit against the county board of education, even though the plaintiff was a member of the class, because the county board was not party to the consent decree. Citing Martin v. Wilks, the court held that a consent decree binds only those who explicitly or implicitly consent to it.[88]

In the Eighth Circuit, reverse-discrimination plaintiffs recently argued that under an agreement entered into by the City of Omaha, the City had pursued policies and practices that harmed them. The City defended its policies and practices on the basis of the consent decree. The plaintiffs have argued that the consent decree is not a defense under Wilks because the plaintiffs were not parties to it.[89]

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[88] Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806 (M.D. Ala. 1989).

In two other actions against the City of Omaha, female police officers claim discriminatory actions against them by the city's police department.[90] According to the attorney representing the plaintiffs in both cases, if the city defends its promotional practices on the basis of the consent decree, the plaintiffs will argue that the consent decree is no longer valid because its corrective intention has been fulfilled after five years. The plaintiffs may argue in the alternative that even if the decree is valid, they were not parties to it. Thus, under Wilks, they would not be bound by the decree. In yet another action against Omaha, the Police Union has brought a reverse discrimination action against the City for promotion practices conducted under the consent decree.[91]

In Grand Rapids, Michigan, plaintiffs have brought a reverse discrimination action challenging an agreement entered into by the City in settlement of

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[89] Donaghy v. City of Omaha, No. CU 88-0-321 (D. Neb. filed April 26, 1988).

[90] Palmer v. City of Omaha, No. 90-0-318 (D. Neb. filed June 29, 1990); Keller v. City of Omaha, No. 894 (Neb. Dist. Ct. filed Jan. 18, 1991).

[91] Wade & Invener v. City of Omaha, No. 871568 (Neb. Dist. Ct. filed Sept. 16, 1988).

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litigation whereby the City adopted certain promotion and testing procedures.[92] A consent decree entered into by the Cleveland Fire Department, instituting hiring and promotion practices, is also under challenge.[93] Under Wilks, the cities will find it difficult if not impossible to defend the actions based on the prior court decrees.

Finally, a new challenge has been brought to a consent decree in San Francisco.[94] The plaintiff firefighters will rely on Wilks to proceed in their collateral attack on the promotion practices administered pursuant to the consent decree entered into in 1988. This is despite the fact that one court has already rejected a collateral attack on the San Francisco firefighter consent decree brought by another group of white firefighters.[95] Under Wilks, however, repetitive challenges to the very same consent decree can continue to be filed in the future.

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[92] Anderson v. Grand Rapids Police Department, No. 1:90-CV-712 (W.D. Mich. filed Aug. 17, 1990).

[93] Local No. 93 v. City of Cleveland, No. C-86-2858 (N.D. Ohio filed July 18, 1986); Copperman v. City of Cleveland, No. C-86-2389 (N.D. Ohio filed June 5, 1986).

[94] Albano v. City and County of San Francisco, No. C-90-2903 (N.D. Cal. filed Oct. 11, 1990).

[95] See Van Pool v. City and County of San Francisco, 752 F. Supp. 915 (N.D. Cal. 1990).

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Wilks has clearly increased the vulnerability of cities and other employers to relitigation challenging their hiring and promotion practices based on often longstanding decrees entered into after prolonged litigation in the first instance. Unless legislation provides the necessary protection and validity to existing court-ordered decrees and the necessary framework within which future consent decrees may be established and practiced without challenge, employers will face continuing challenges in courts brought by an endless array of different groups, producing ill-affordable financial consequences, and an ensuing reluctance by employers to enter into future agreements that remedy discrimination.

Conclusion

As this study has demonstrated, the Supreme Court's 1989 Title VII decisions continue to have a significant harmful effect on efforts to combat discrimination in the workplace. The Court's decisions continue to make it far more difficult for workers to prove discrimination and obtain effective, stable relief in the courts, while making it far easier for employers to avoid liability for conduct with discriminatory impact. The net result is to substantially impede the ability of Title VII to produce fair employment practices for all American workers.

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MARTIN v. WILKS AND THE ATTEMPTED UNRAVELING OF AFFIRMATIVE ACTION

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Introduction

Over one and one-half years after Martin v. Wilks, 109 S. Ct. 2180 (1989), the pace of litigation in which reverse discrimination plaintiffs attempt to reopen long-settled consent decrees, court-ordered hiring and promotion schemes, and affirmative action plans has not slowed. In at least 13 cities across the country, and in over 40 cases and administrative proceedings, Martin has been used to attack old decrees. Many of the attacks have focused on the purported vulnerabilities of such decrees to new Supreme Court case law.

Martin and its growing number of progeny are cohering into a body of case law that plaintiffs' lawyers 1/ can use in ever more free-ranging efforts to overturn or at least derail established affirmative action plans and consent decrees. Judicial opinions either following or distinguishing Martin have begun to appear in case reporters and on-line legal databases. Many more cases are in the summary judgment stage, and opinions may be expected within the next year. At a minimum, the litigation discussed herein and new lawsuits inspired by it and Martin will

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1/ See, e.g., Lang, Big Rush of Suits on Reverse Bias: Bay Area Groups Attack Affirmative Action Plans, San Francisco Chronicle, Apr. 5, 1990, at A1.

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continue to divert the scant resources of the civil rights bar from seeking affirmative relief for its clients to refighting battles already won a decade ago. 2/

2/ Thus Assistant Attorney General Dunne's testimony that because *Martin* has not led to the reversal of any consent decrees, the proposed new civil rights act need not deal with *Martin*, misses the point. In any event, as shown below, *Martin* has been a major factor in many more than the three cases which Mr. Dunne mentioned in his memorandum for Attorney General Thornburgh. *See* Saul, *Lawsuit Study Stirs Job Bias Debate*, Newsday, Feb. 8, 1991, at 13; Dunne, Mem. for the Att'y Gen. at 1-2, Tab B (Feb. 7, 1991).

I. Martin v. Wilks

In a 5-4 ruling on June 12, 1989, the Supreme Court held that a person could not be precluded from filing a separate lawsuit challenging a consent decree unless that person was made a party to the consent decree action - even if that person had had an opportunity to be heard by the court prior to the entry of the decree.

Everyone agrees that prior to the entry of a decree people whose rights may be affected by the decree should have a fair opportunity to have their "day in court". 3/ The issue raised by the Supreme Court's decision, instead, is whether there should be reasonable and orderly procedures to protect those rights prior to the entry of a decree, or whether instead such claims can be relitigated without end.

The *Martin* decision has already resulted in numerous long-settled cases being reopened to the prospect of perpetual litigation. The decision threatens to lead to renewed litigation over every consent decree and litigated order 4/ where persons claim they were "adversely affected",

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3/ Indeed, that is precisely what happened in the *Martin* case. *See infra* p. 8.

4/ The decision applies equally to both consent decrees and to litigated judgments and orders where no consent decrees are involved.

no matter how much time has passed since the original lawsuit and no matter how many chances the "adversely affected" persons had to participate in the original lawsuit. 5/ In addition, by holding out the likelihood of interminable litigation and possible multiple liability even after settlement, the decision undermines the Congressional preference for settlement of employment discrimination lawsuits and destroys the vital concept of finality of litigation. Instead, the Martin decision has led and will continue to lead to an unnecessary waste of precious judicial and other resources on issues resolved years earlier. Many employers are strongly opposed to the rule announced in this decision because of its disruptive impact.

The Martin litigation itself has already lasted over 17 years, with no end in sight. Martin v. City of Birmingham was filed by the Lawyers' Committee for Civil Rights Under Law on January 7, 1974, on behalf of black

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5/ The four dissenters noted that "[t]here is nothing unusual about the fact that litigation between adverse parties may, as a practical matter, seriously impair the interests of third persons who elect to sit on the sidelines. Indeed, in complex litigation this Court has squarely held that a sideline-sitter may be bound as firmly as an actual party if he had adequate notice and a fair opportunity to intervene and if the judicial interest in finality is sufficiently strong" (citations omitted). 109 S. Ct. at 2200. (Stevens, J., dissenting, joined by Brennan, J., Marshall, J., and Blackmun, J.).

employees of, and applicants for employment with, the City of Birmingham, Alabama, and Jefferson County, Alabama. 6/ The Martin action alleged race discrimination in hiring and promotions. In May 1975, the United States Department of

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6/ No. 74-P-0017-S (N.D. Ala. filed Jan. 7, 1974). A related case claiming race discrimination by the city had been filed three days earlier by the Ensley Branch of the NAACP in Birmingham. Ensley Branch, NAACP v. Seibels, No. 74-Z-12-S (N.D. Ala. filed Jan. 4, 1974). At the time these cases were filed, there were virtually no black persons in any of the jobs in the "classified" civil service of the City of Birmingham, which includes virtually all jobs other than laborer jobs, such as police officers, firefighters, truck drivers and secretaries. As late as 1958, the job announcements for positions in the classified service expressly stated that "[a]pplicants must be white." Although, as a result of litigation, the city stopped using such job announcements, the discrimination continued. In the fire department, for example:

> Blacks were actively discouraged from applying for firefighter positions.
>
> The city did not hire a black firefighter until 1968.
>
> The city did not hire another black firefighter until 1974, although during that six-year period it hired 170 white firefighters.
>
> Entry-level examinations discriminated against black applicants.
>
> By 1976, only nine (1.4%) of the city's 630 firefighters were black.
>
> By 1981, only 9.3% of the firefighters were black, and none of the 140 lieutenants, captains and battalion chiefs was black.

The same pattern existed throughout the city workforce.

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Justice filed a related case - *United States v. Jefferson County* 7/ - alleging that blacks and women were victims of race and sex discrimination by the City of Birmingham, Jefferson County, and a number of smaller jurisdictions. *Martin*, *Ensley*, and *United States v. Jefferson County*, among other cases, were consolidated for discovery and trial. After two trials and two appeals, a finding of discrimination in hiring 8/ and the introduction of massive evidence of discrimination in promotions in the fire Department 9/ and in other city departments, the *Martin*

7/ No. 75-P-0666-S (N.D. Ala. filed May 27, 1975).

8/ *Ensley Branch, NAACP v. Seibels*, 14 Fair Empl. Prac. Cas. (BNA) 670 (N.D. Ala. Jan. 10, 1977), *aff'd in part and rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980).

9/ The evidence of promotional discrimination adduced at the 1979 trial was egregious. For example,

> To be eligible to take promotional examinations, employees had to receive "passing" promotional potential evaluations that were subjectively graded by supervisors (*all* of whom were white), and in the fire department, black employees received "failing" scores four times more often than did white employees.
>
> There were also time-in-grade requirements to be eligible to take promotional examinations, but because blacks had been excluded from entry-level positions, in 1979 only *one* black firefighter, compared to 361 white firefighters, met those requirements.
>
> One "seniority point" was added to the examination scores of applicants for promotion for each year of their employment in *any* position in the

plaintiffs and the Department of Justice entered into consent decrees with the City of Birmingham and their civil service agent, the Jefferson County Personnel Board, in 1981. These consent decrees included affirmative action goals for the hiring and promotion of blacks and women in city jobs.

Prior to entry of the decrees in August 1981, counsel for the Birmingham Firefighters Association (B.F.A.) appeared in court on behalf of the B.F.A. and its president at a fairness hearing 10/ and objected to the decrees on the ground that the affirmative action goals constituted illegal and unconstitutional race discrimination against white males. The court considered this and other objections to the decrees and ruled that the decrees were fair and lawful. 11/

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classified service - not necessarily in the same chain for promotion - which discriminated against black employees because they had been excluded from the classified service.

As a result of these and other practices, no black person had ever been promoted in the fire department prior to the 1981 consent decrees.

10/ Notice had been given of the proposed decrees and the fairness hearing to "all interested persons".

11/ Counsel for the B.F.A. declined the court's invitation to offer any evidence at the fairness hearing. Counsel for the B.F.A. also failed to move to intervene at any time prior to the fairness hearing. The motion to intervene of

Eight months after the consent decrees were entered, the first of several lawsuits was filed by white male employees of the fire department and of other departments claiming, among other things, that the city was engaging in "reverse discrimination" in promotions because of the consent decrees. The fire department lawsuits contested the promotions of the very first blacks in the history of the fire department. 12/ The claims of the white male firefighters and one white male engineer were tried first. In December 1985, after a five-day trial which followed the taking of dozens of depositions, the district

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the B.F.A. after the fairness hearing was denied by the district court as untimely. United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. Aug. 18, 1981). The denial of intervention was affirmed on appeal and the B.F.A. did not file for a writ of certiorari. United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983). At the fairness hearing, a group of black employees objected to the decrees as inadequate and the white firefighters opposed any race-conscious relief. The court overruled both sets of objections.

12/ The same counsel represented both the B.F.A. at the fairness hearing in the Martin case and the individual white male firefighters in the "reverse discrimination" cases. All of the white male plaintiffs in the "reverse discrimination" cases were members of the B.F.A. at the time of the fairness hearing in Martin. The same arguments were made with respect to the consent decrees in the "reverse discrimination" complaints, as had been made at the fairness hearing. In part because of these facts, the Martin plaintiffs and the city argued that the "reverse discrimination" plaintiffs already had their "day in court".

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court dismissed the claims of the white male firefighters and the engineer as lacking merit and found that the challenged promotions were required by the city decree. 13/ The Eleventh Circuit Court of Appeals reversed and remanded for another trial on the grounds that the white male plaintiffs had a right to continue to litigate their separate lawsuits, and that the trial court may have dismissed their claims, in part, on the improper ground that they did not have a right to collaterally attack the consent decrees. 14/

The Supreme Court granted certiorari on the issue of whether persons, having had an opportunity to be heard prior to the entry of a consent decree, nevertheless have a right to file separate lawsuits challenging such a decree.

The Lawyers' Committee and the City of Birmingham argued before the Supreme Court that the white firefighters did not have the right to undermine the finality of the

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13/ *In re Birmingham Employment Litig.*, 39 Fair Empl. Prac. Cas. (BNA) 1431 (N.D. Ala. Dec. 20, 1985). Chief Judge Sam C. Pointer, Jr., found, *inter alia*, that there would have been racial discrimination against blacks and that the white male engineer would have been promoted, *because he was white*, if the consent decrees had not existed. The district court held that collateral attacks are impermissible, and, in the alternative, that the claims of the "reverse discrimination" plaintiffs were without merit.

14/ *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492 (11th Cir. 1987).

settlement embodied in the consent decrees, given that they had had notice of the decrees and an opportunity to be heard prior to the entry of the decrees. The Court, in a 5 to 4 decision on June 12, 1989, rejected this argument. Chief Justice Rehnquist, writing for the Court, held that such collateral attacks are permissible, rejecting the overwhelming majority rule of the Circuit Courts of Appeal. 15/

15/ See, e.g., Marino v. Ortiz, 806 F.2d 1144, 1146-47 (2d Cir. 1986), aff'd by an equally divided court, 484 U.S. 301 (1988) (per curiam); Culbreath v. Dukakis, 630 F.2d 15, 22-23 (1st Cir. 1980); Goins v. Bethlehem Steel Corp., 657 F.2d 62, 64 (4th Cir. 1981), cert. denied, 455 U.S. 940 (1982); Striff v. Mason, 849 F.2d 240, 245 (6th Cir. 1988); Stotts v. Memphis Fire Dep't, 679 F.2d 541, 558 (6th Cir. 1982), rev'd on other grounds sub nom Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles, 658 F.2d 694, 696 (9th Cir. 1981); Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Grann v. City of Madison, 738 F.2d 786, 795 (7th Cir.), cert. denied, 469 U.S. 918 (1984); EEOC v. McCall Printing Corp., 633 F.2d 1232, 1237 (6th Cir. 1980); Black and White Children of the Pontiac School Sys. v. School Dist., 464 F.2d 1030 (6th Cir. 1972) (per curiam); Burns v. Board of School Comm'rs, 437 F.2d 1143, 1144 (7th Cir. 1971) (per curiam); Prate v. Freedman, 430 F. Supp. 1373, 1375 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); O'Burn v. Shapp, 70 F.R.D. 549, 552-53 (E.D. Pa.), aff'd mem., 546 F.2d 417 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977); Freeze v. ARO, Inc., 503 F. Supp. 1045, 1047-48 (E.D. Tenn. 1980); Jefferson v. Connors Steel Co., 25 Empl. Prac. Dec. (CCH) ¶ 31,602, at 19,486 (N.D. Ala. Jan. 19, 1981); Austin v. County of DeKalb, 572 F. Supp. 479, 481 (N.D. Ga. 1983). Other than the Eleventh Circuit, the only other Circuit to rule in favor of collateral attacks pre-Martin v. Wilks was a panel of the Seventh Circuit in Dunn v. Carey, 808 F.2d 555,

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II. The General Impact of Martin v. Wilks

The Court's 5-4 ruling effectively ends finality for a host of litigated and consent decrees not only in the area of employment discrimination, but also in every other kind of litigation where there may be persons "adversely affected" by a court order. Long-settled cases are thus now open to periodic challenge by those dissatisfied with results, even if those persons knowingly had bypassed opportunities to intervene in the litigation. 16/ This decision raises the prospect of repeated relitigation of underlying claims.

In an interpretation of Rule 19 of the Federal Rules of Civil Procedure, the majority ruled that the only way to preclude a person "affected" by the provisions of a decree from challenging the decree in a subsequent suit is by mandatory joinder of that person as a party, even if the

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559-60 (7th Cir. 1986). Claims in all of the above cases, among others, are now subject to reopening because of the Martin v. Wilks decision. See infra p. 25 (the reopening of the Marino litigation).

16/ The Court had previously held that notice and the opportunity to be heard were sufficient to preclude people from later challenging a judicial determination, consistent with due process. See, e.g., Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478, 485-91 (1988); Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

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person chose not to intervene. Moreover, instead of requiring persons who know their interests will be affected and who desire to be heard to come forward prior to the entry of a court order, the decision places the burden on the existing parties - including both plaintiffs and employers - to identify potentially affected persons and to join them as parties against their will.

Justice Stevens, writing for the four dissenters, strongly opposed the decision because it would "subject large employers who seek to comply with the law by remedying past discrimination to a never-ending stream of litigation and potential liability. It is unfathomable that either Title VII or the Equal Protection Clause demands such a counterproductive result." 17/

Prior to the decision, numerous employers and employer groups filed amicus briefs urging the Supreme Court not to create such a procedural rule, on the grounds that it is expensive, unworkable, disruptive and unfair. These employers included 32 states, the Virgin Islands, and the District of Columbia, as well as numerous organizations representing state and local governmental employers and private employers throughout the country - the National

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17/ 109 S. Ct. at 2200.

League of Cities, the National Governors' Association, the U.S. Conference of Mayors, the Council of State Governments, the International City Management Association, the National Conference of State Legislatures, the National Association of Counties, and the Equal Employment Advisory Council (EEAC) (a national association of private employers comprising a broad segment of the business community nationwide). The only employer to file a brief supporting collateral attacks was the United States Department of Justice, which suddenly switched sides in 1984 and sued the City of Birmingham for promoting blacks under the decrees the Justice Department itself had negotiated in 1981. 18/

18/ This happened during the tenure of W. Bradford Reynolds as Assistant Attorney General for the Civil Rights Division of the Department of Justice, despite the following:

> The Birmingham consent decrees were sought by, and entered during, the Reagan Administration.
>
> Mr. Reynolds stated the following, under oath, in response to a question by Senator Heflin of Alabama: "I did not disagree with the decree in any way between the time that it was submitted to the court and the time the court entered the decree." Confirmation of W. Bradford Reynolds to be Assistant Attorney General of the United States: Hearings before the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 907 (June 4, 5, 19, 1985) (statement of W. Bradford Reynolds).
>
> The Department of Justice signed the decrees and promised to defend their lawfulness against collateral attack.

The likely effects of the Martin v. Wilks ruling include an increased reluctance by both plaintiffs and defendants to settle cases, at least without costly and extensive pre-settlement litigation, including the joinder of numerous additional parties. In addition, both supporters and opponents of the ruling agree that, as a result of the ruling, employment discrimination cases will be much more difficult to litigate. 19/ The impact of the decision, to date, has been substantially greater in cases involving public employers using the results of tests (regardless of whether or not the tests are job-related) to

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19/ Mr. Reynolds' former deputy at the Department of Justice - Charles Cooper - who personally represented the Department in switching sides in the Birmingham litigation in 1984 - stated that the Martin decision was a "home run" for white men. "Every time someone gets passed over [for promotion] they have a new cause of action and a lawsuit," said Cooper, adding that "the process of entering consent decrees with racially preferential relief is going to be considerably more difficult" because of the Martin ruling. Kamen, Bias Suits by Whites Bolstered; Split Court Eases Way for Challenges to Affirmative Action, The Washington Post, June 13, 1989, at A4. Benna Ruth Solomon, then Chief Counsel of the State and Local Legal Center, who filed an amicus brief in the Supreme Court on behalf of numerous state and local government organizations in support of the position of the City of Birmingham, said that the Martin decision "is going to make it extremely difficult to litigate, much less conclude, employment discrimination lawsuits because [bringing in all potentially affected parties] is not really feasible in the real world in many of these cases and that is the only avenue that the court will accept for precluding subsequent litigation of the same issue." Id.

list the order of the test-takers. This is because rank ordering creates stronger expectations of hire, and especially, promotion. Because incumbent employees are more likely to claim an interest in the implementation of the decree than applicants, they are also more likely to file "reverse discrimination" lawsuits. In addition, at least one public sector employee association has funded and supported such collateral attacks. 20/

It is far from clear what mechanism the Supreme Court majority expects parties to employ in terms of joining or otherwise precluding potentially affected parties from further litigation. Even after joinder of all known affected persons and extensive litigation, the Martin decision would still allow for litigation years later by any person who was not a party to the original proceeding. Finally, the decision has made at least some employees more reluctant to agree to affirmative action plans because of

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20/ A June 15, 1989 memorandum from Alfred K. Whitehead, President of the International Association of Firefighters (IAFF) to all IAFF State, Provincial, and Local Union Presidents stated that "the International's Executive Board supported the [Martin v. Wilks] litigation financially through the approval of an EDF grant to Local 117 (Birmingham, Alabama), and further approved a request to file an amicus curiae ('friend of the court') brief on behalf of the firefighters who filed a complaint against the City and the Board seeking injunctive relief against enforcement of the decrees."

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increased fear of incessant "reverse discrimination" litigation and multiple liability.

The impact of the Martin decision is particularly severe because of another case the Court decided shortly after Martin. Although the issue was not before the Court, the Supreme Court surprisingly stated in this case - Independent Fed'n of Flight Attendants v. Zipes - that because of its decision in Martin v. Wilks, Title VII plaintiffs defending decrees in collateral lawsuits "have no basis for claiming attorney's fees" against anyone in such lawsuits. 21/ Justice Marshall, in dissent, called this "conclusory dicta of the worst kind". 22/ The five-person majority suggested that since Title VII plaintiffs would "still face the prospect of litigation without compensation for attorney's fees before the fruits of their victory can be secure", it may not be too much of an additional disincentive to bringing Title VII litigation if plaintiffs cannot recover against intervenors. 23/

Justice Marshall, in his dissent for three Justices, stated that the likely consequences of the Zipes

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21/ 109 S. Ct. 2732, 2737 (1989).

22/ Id. at 2745 n.6.

23/ Id. at 2737.

decision will be for defendants to rely on intervenors to raise many of their defenses, thus minimizing fee exposure. Without hope of compensation for such expenditures, "many victims of discrimination will be forced to forego remedial litigation for lack of financial resources. As a result, injuries will go unredressed and the national policy against discrimination will go unredeemed." 24/

The Zipes ruling effectively denies attorney's fees to the victims of discrimination in all cases where they have had, or will have, to defend decrees in "reverse discrimination" litigation. Instead of providing an incentive for attorneys to represent Title VII claimants by providing attorney's fees when plaintiffs prevail, this decision allows for endless litigation, without compensation, after relief is secured. The combined impact of Martin and Zipes is devastating to the prospects of securing and maintaining meaningful relief for the victims of employment discrimination.

24/ Id. at 2746.

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III. *Challenges to Settled Affirmative Action Plans and Consent Decrees Under Martin v. Wilks*

A. *Birmingham, Alabama*

1. *Martin v. Wilks*

Martin was remanded to the Northern District of Alabama. 25/ There, before Judge Pointer, the plaintiff white firefighters will have the opportunity pursuant to the Supreme Court's opinion to challenge the validity of the consent decrees (all entered by Judge Pointer) which govern, *inter alia*, promotions in the fire department. On the strength of *Martin*, plaintiffs moved to (1) intervene in the proceedings in which these decrees were reached, 26/ and (2) consolidate the reverse discrimination and consent decree cases. On May 25, 1990, Judge Pointer granted the motion for intervention for the purpose of allowing the white firefighters to participate in any modification of the

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25/ The case is known there as *In re: Birmingham Reverse Discrimination Employment Litig.*, No. 84-P-0903-S (master case file created Apr. 12, 1984).

26/ *United States v. Jefferson County*, No. 75-P-0666-S (N.D. Ala. filed May 27, 1975), *Martin v. City of Birmingham*, No. 74-P-0017-S (N.D. Ala. filed Jan. 7, 1974), *Ensley Branch, NAACP v. Seibels* (N.D. Ala. filed Jan. 4, 1974), No. 74-Z-12-S. The decrees with Birmingham and the Jefferson County Personnel Board were entered on August 21, 1981, and the decree with Jefferson County was entered on February 28, 1983. Only the city and board decrees are now at issue. Hiring and promotion throughout the city and county civil service is governed by the decrees.

decrees. The motion for consolidation was denied. 27/ The interests of defendant-intervenors (*i.e.*, black and female employees and applicants for employment with the City of Birmingham) in the reverse discrimination cases are being represented by a classes of plaintiffs and plaintiff-intervenors in the decree modification proceedings.

On February 27, 1991, Judge Pointer held a hearing on decree modification. The City of Birmingham, plaintiff-intervenors, and the United States have agreed that where the decrees' long-term hiring or promotional goals for a position have been met, those goals may be replaced by the goal of administering selection procedures that are without adverse impact on blacks or women, or that are job-related. As an interim goal, hiring or promotion for the position shall be based on the pool of qualified applicants. The parties have not agreed on how to treat positions for which the decrees' long-term goal has not been met - the city and plaintiff-intervenors argue that the

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27/ The reverse discrimination case is itself a consolidation of numerous challenges to the decree, including *Bennett v. Arrington*, No. 82-P-0850-S, *Wilks v. Arrington*, No. 83-P-2116-S, *Birmingham Ass'n of City Employees v. Arrington*, No. 82-P-1852-S, *Zannis v. Arrington*, No. 83-P-2680-S, and *Garner v. City of Birmingham*, No. 82-M-1461-S.

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decrees' long-term goal (and accompanying interim goal) for a position should remain in place until it is met, while the United States, contrary to its position in other pending litigation, argues that even if that goal has never been met, it should be abolished and replaced by the goal of administering lawful selection procedures. The white firefighters, who on the strength of Martin are now full-fledged partners in the decree modification process, seek termination of the decrees within four years and immediate vacation of all long-term and interim goals. Briefs are due on March 8, and a decision is expected shortly thereafter.

2. Williams v. Bailey

One month after the decision in Martin was rendered, two white males holding entry-level Deputy Sheriff positions in the Sheriff's Department who had been passed over for promotion to Sheriff's Sergeant brought an action, alleging claims under Title VII and §§ 1981 and 1983. 28/ Although originally alleging both the illegality of the decrees and their unlawful implementation by defendants, plaintiffs later narrowed their claims to allege only the

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28/ Williams v. Bailey, No. CV-89-PT-1241-S (N.D. Ala. filed July 19, 1989). Unlike Martin, which principally concerns the decree entered into by the City of Birmingham, Williams principally concerns the decrée entered into by Jefferson County.

latter. On August 29, 1990, Judge Pointer ruled that the Sheriff of Jefferson County had not acted unlawfully or in violation of the decrees in taking race and sex into account when denying promotions to plaintiffs. (Judge Pointer had previously granted summary judgment motions dismissing the claims against all of the other defendants.) Plaintiffs have taken an appeal on all of their claims except for those under Title VII. 29/ The appeal is fully briefed and the parties await the Eleventh Circuit's ruling.

29/ Williams v. Bailey, No. 90-7666, appeal docketed (11th Cir. Oct. 9, 1990).

B. *Albany, Georgia*

At the federal appellate level, one of the most damaging cases to build on *Martin* remains *Mann v. City of Albany*. 10/ Plaintiff challenged a permanent injunction entered in 1976 which governed the hiring and promotion of all city employees. 11/ The injunction had been entered in a Title VII case alleging a pattern or practice of discrimination against black job applicants, employees, and dischargees. The case had been brought against the city and its officials on behalf of a class of its former, present and future black employees. After making a finding of prior discrimination, the *Johnson* court had entered the injunction, and the city did not appeal.

Plaintiff in *Mann*, a white male, had been denied the Assistant Fire Chief position in favor of a black male. Plaintiff sued the city and the individual who had been hired in his stead, alleging that the city had engaged in unlawful reverse race discrimination under Title VII, §§ 1981 and 1983, and the Fourteenth Amendment in denying him the promotion pursuant to the decree.

10/ 883 F.2d 999 (11th Cir. 1989).

11/ *Johnson v. City of Albany*, No. 1200 (M.D. Ga. injunction entered Sept. 2, 1976).

The district court had ruled that Mann could collaterally attack the decree by bringing his reverse case (rather than attempting to challenge the decree in the underlying litigation), but then held Mann's claims to be barred by *res judicata* because his interests had been adequately represented by the city in *Johnson*. Three months after *Martin*, the Eleventh Circuit in *Mann* reversed, holding that plaintiff in *Mann* and the city as of the time of *Johnson* were not privies and had differing interests. Thus, Mann's claims were not barred and would be heard on remand. The Eleventh Circuit instructed the district court on remand to consider whether compelling joinder of the plaintiff class from *Johnson* would be appropriate.

C. New York City

1. Marino v. Ortiz

In Marino v. Ortiz, 32/ the Second Circuit refused to extend movants' time to file a petition for rehearing. Movants expressly sought this rehearing in order to be able to make use of Martin. However, movants were seeking a rehearing of an 18 month-old Supreme Court opinion, Marino v. Ortiz, 484 U.S. 301 (1988) (per curiam), and the Court of Appeals could find no justification for such an extraordinary extension of time.

In Marino, an equally divided Supreme Court had affirmed the impermissible collateral attack rule. A group of police officers had filed Marino in 1985 as a challenge to a tentative consent decree entered in settlement of litigation, and had then aired its objections at the fairness hearing for the proposed decree. However, the officers were not joined and refused to intervene in the decree case. Their objections were considered at the hearing and rejected, and the decree was entered. The Supreme Court affirmed the district court's dismissal of the officers' objections to the decree and affirmed (because it

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32/ 888 F.2d 12 (2d Cir. 1989), cert. denied, 110 S. Ct. 2172 (1990).

was equally divided) the dismissal of the officers' case based on the impermissible collateral attack rule.

2. Paganucci v. City of New York

Counsel for the plaintiffs in Marino has filed a new action founded on Martin. 11/ The action is brought under § 1983 on facts identical to those in Marino.

The decree at issue in Marino had settled Title VII disparate impact litigation over a promotional exam for the police sergeant position in the New York City Police Department given in 1983. That litigation had been brought by the Hispanic Society of Police Officers, representing a group of Hispanic police officers whose exam grades did not qualify them for promotion. (The Society was shortly thereafter joined as a plaintiff by the Guardians Association, a group of black police officers.)

The tentative settlement of the Hispanic case had triggered the filing of Marino, also a § 1983 reverse discrimination action, by a group of police officers who had received grades similar to those of the Hispanic plaintiffs on the 1983 exam but had not been promoted. Plaintiffs in Marino ignored the fact that the Hispanic plaintiffs were being promoted pursuant to a consent decree in settlement of

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11/ Paganucci v. City of New York, No. 90 Civ. 1598 (S.D.N.Y. filed Mar. 9, 1990).

litigation, and simply asserted that individuals receiving equal scores on exams should be promoted equally.

The *Marino* plaintiffs had their claims heard and rejected by Judge Carter in the district court, and refused to intervene in the decree case. They then had their claims rejected by the Second Circuit and the Supreme Court, 34/ and had their claims rejected again on remand by the Second Circuit. *See supra* p. 25.

Undaunted, a number of the *Marino* plaintiffs have now brought *Paganucci*, alleging once again that because the plaintiffs in *Hispanic* scored no higher than them on the 1983 exam, they deserve to be promoted on an equal basis with the *Hispanic* plaintiffs. These identical claims have been repeatedly heard and rejected by the courts; the only difference between *Marino* and *Paganucci* is that the plaintiffs in the latter rely on *Martin*. *Paganucci* was filed solely as a result of *Martin*.

34/ *Hispanic Soc'y v. New York City Police Dep't*, 806 F.2d 1147 (2d Cir. 1986) (affirming Judge Carter's dismissal of the objections to the decree)/*Marino v. Ortiz*, 806 F.2d 1144 (2d Cir. 1986) (affirming Judge Carter's dismissal as an impermissible collateral attack), *aff'd sub nom. Costello v. New York City Police Dep't*, 484 U.S. 301 (1988) (affirming the dismissal of objections to the decree)/*Marino v. Ortiz*, 484 U.S. 301 (1988) (affirming, because it is equally divided, the dismissal as an impermissible collateral attack).

Plaintiffs in Paganucci have moved for summary judgment on the strength of Martin, and defendants (the city, its department of personnel, its police department, and its police commissioner and director of personnel) have cross-moved for summary judgment, arguing that plaintiff's claim in Paganucci is as meritless as it was in Marino and that the result in Marino is res judicata against those of the Paganucci plaintiffs who were plaintiffs in Marino. The Hispanic Society of Police Officers and the Guardians Association, plaintiffs in the Hispanic case, have intervened as defendants in Paganucci and have joined defendants' motion for summary judgment. The motions are pending before Judge Ward.

D. Youngstown, Ohio

In Rafferty v. City of Youngstown, 35/ six white police officers employed by the Youngstown police department, both male and female, brought a reverse discrimination suit against the city, the mayor, the police chief, the civil service commission, individual members of the commission, and six black and Hispanic police officers. Plaintiffs all passed the exam for detective-sergeant and alleged that the prospective promotions of the six black and Hispanic defendants from the entry-level position to detective-sergeant would violate plaintiffs' rights under Title VII and § 1983. The prospective promotions were to be made pursuant to a 1986 consent decree entered into by the city and a class of black police officers. 36/

Plaintiffs alleged that defendants' refusal to promote them to detective-sergeant was based solely on plaintiffs' race. Plaintiffs sought promotions, back pay,

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35/ No. 89-CV-1225 (N.D. Ohio filed June 27, 1989) (LEXIS, Genfed library, Courts file), appeal dismissed, No. 89-3582 (6th Cir. July 27, 1989) (WESTLAW, Federal library, Allfeds file).

36/ The decree was entered by Judge Lambros in settlement of a lawsuit brought by the class in January 1976 alleging racial discrimination in violation of the Fourteenth Amendment and §§ 1981 and 1983 in the hiring and promotion practices of the police department. Williams v. Vokavich, No. C76-6-Y (N.D. Ohio decree entered Jan. 14, 1986) and retroactive seniority. Plaintiffs argued as the basis for their motion for injunctive relief that "the Court's opinion in *Martin* provides [plaintiffs] with standing to now attack the Consent Decree settlement disputed herein through the vehicle of a separate, independently intiated proceeding alleging that the terms of the Decree and planned settlement agreement thereunder, in fact, discriminate against them on the basis of their race."

In addition to being authorized by the decree, the promotions of which plaintiffs complained were made in settlement of claims brought in 1987 by numerous officers in the department who had intervened in the decree case. The settlement of these claims via the prospective promotions was agreed to not only by the intervening officers but also by the Fraternal Order of Police (FOP), which was plaintiffs' union representative, as well as an intervenor in the decree case since 1979. (The FOP had vigorously opposed the decree.) Thus the district court, *per* Judge Lambros, *see infra* p. 78, distinguished *Martin*, holding that the *Rafferty* plaintiffs were bound by the settlement of the 1987 intervenors' claims since they had been "adequately represented" by the FOP in the settlement talks, as in all of the decree proceedings since 1979. 37/

37/ The adequate representation doctrine was noted by Chief Justice Rehnquist in Martin, 108 S. Ct. 2184 n.2. See infra note 48.

E. Gadsden, Alabama

In 1978, a lawsuit was brought against the city alleging racial discrimination in the city fire department's hiring practices for the firefighter position. The suit challenged a hiring test which disproportionately excluded blacks but which had not been shown to be job-related, as well as other hiring practices. A consent decree was entered into in 1979 in settlement of the suit, and the decree now governs hiring by the department for the firefighter position. In 1987, five white city firefighters sued the city and the board, collaterally attacking the decree. Blacks hired pursuant to the decree on the same date in 1985 as plaintiffs had been placed higher than plaintiffs on the seniority list, although plaintiffs had scored higher on the qualifying exam. Plaintiffs claimed that this seniority ranking constituted reverse discrimination in violation of Title VII, § 1983, and the Fourteenth Amendment. Defendants argued that the superior ranking of black hirees was a departmental policy undertaken to comply with the decree. Plaintiffs sought an injunction placing them atop the seniority roster and reimbursing them for lost wages and benefits. After a bench trial, the court denied the injunction, explicitly noting that collateral attacks were permitted by Martin but finding that the seniority ranking of black firefighters above white firefighters hired on the same day was a departmental policy, and that this ranking and the consent decree were justified. 38/

In an unreported opinion, the Eleventh Circuit reversed the district court, 39/ finding that appellants' inferior placement on the seniority roster had already had and would continue to have an adverse effect on appellants with respect to promotions, transfers, layoffs, assignments, and benefits. The appellate court, which was able to entertain this collateral attack on the Gadsden decree on the strength of *Martin*, also found that in the 1978 case that had led to the consent decree, findings had only been made regarding past discrimination in hiring, not seniority. Thus the decree only governed hiring, and not seniority, and the district court had erroneously relied on the decree and findings in the decree case to justify the department's seniority decisions and deny relief. 40/ The appellate

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38/ *Henry v. City of Gadsden*, 715 F. Supp. 1065 (N.D. Ala. 1989).

39/ *Henry v. City of Gadsden*, No. 89-7521 (11th Cir. July 10, 1990) (per curiam).

40/ The fact that no blacks had ever been hired as firefighters by the city prior to the entry of the decree might explain why the court in the decree case felt no need to make findings of racial discrimination regarding seniority practices in the fire department.

court also held that there was no basis for the district court to find that the department had a policy of always ranking black firefighters hired on the same day as white firefighters ahead of the whites on the seniority roster regardless of the scores on the qualifying exam. Rather, the ranking of appellants behind the black hirees in 1985 may merely have been an *ad hoc* decision.

On remand, the district court found that under *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), "a standard with which this court profoundly disagrees but by which it nonetheless is bound", the city's actions denied plaintiffs their rights under the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs were awarded nearly three thousand dollars in damages for lost backpay with interest, plaintiffs' attorneys were awarded nearly $20,000 in fees, the city was permanently enjoined from not placing plaintiffs' names ahead of the black promotees' names on the seniority roster based on plaintiffs' higher scores on the promotional exam (despite the exam not being "validated" - that is, proven to have any relation to occupational ability 41/), and costs were taxed against the city. 42/

41/ *Henry*, 725 F. Supp. at 1066 n.1.

42/ *Henry*, No. 87-C-1338-M, Mem. of Opinion on Remand (N.D. Ala. Oct. 26, 1990) (Clemon, J.); *Henry*,

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Were it not for Martin, this case might well not have made it back to the district court.

No. 87-C-1338-M, Final Judgment and Permanent Injunction (N.D. Ala. Oct. 26, 1990) (Clemon, J.).

F. *San Francisco/Oakland, California*

There has been a flurry of *Martin*-inspired lawsuits in the Bay area. 43/

1. *Van Pool v. City & County of San Francisco*

Claims based on *Martin* were dismissed based on the adequate representation doctrine, *see infra* note 48, in *Van Pool v. City & County of San Francisco*. 44/ *Van Pool* had been brought on November 21, 1989, by seven white male firefighters employed by the San Francisco Fire Department. Each was passed over for fire lieutenant after taking the 1984 qualifying exam and being placed on a list of eligible promotees. The case, alleging violations of state law, §§ 1981 and 1983, and the Fourteenth Amendment, was removed to Judge Patel's court. (Judge Patel entered the 1988 consent decree which still governs promotions by the department, and has continuing jurisdiction over the decree.)

Plaintiffs were each members of the local of the International Association of Firefighters (the firefighters' union representative). The local was given leave in 1985 to

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43/ *See* Pressman, *A Voice for White Males: A San Francisco Lawyer Is Leading the Charge in Reverse Discrimination Cases*, Cal. Lawyer, Feb. 1991, at 30-31.

44/ 752 F. Supp. 915 (N.D. Cal. 1990), *appeal noticed* (9th Cir. Jan. 14, 1991).

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intervene as a defendant (i.e., opposing relief) in the employment discrimination suit which led to the 1988 decree, and thereafter was a vigorous advocate of plaintiffs' interests before Judge Patel and throughout the decree approval and appeal processes. 45/

45/ Evidence of plaintiffs' adequate representation by the local in the decree case, and of their own extensive efforts against the decree is extensive:

The decree approval process - In 1987, Judge Patel granted plaintiffs in the decree case summary judgment and found that the 1984 exam (the same one taken by the Van Pool plaintiffs) violated Title VII. A proposed consent decree, requiring that 25 percent of the promotions to lieutenant be from minority groups, was filed. At the fairness hearing for the decree in December 1987, the local filed objections, including ones to the mandatory hiring of specific numbers of minority candidates. Judge Patel considered and rejected the local's objections, and in May 1988 approved the decree.

The appeal process - In December 1988, the local appealed Judge Patel's approval of the decree, and one year later the Ninth Circuit affirmed. In October 1990, the local's petition for certiorari was denied by the U.S. Supreme Court.

Plaintiffs' own efforts - Plaintiffs, on an individual basis, took an active role in opposing the decree. Three of them lodged objections at Judge Patel's 1987 fairness hearing, which she rejected. In June 1988, pursuant to the decree, the department promoted 81 firefighters to lieutenant, not including any of the plaintiffs. In July 1988, five of the plaintiffs filed departmental complaints alleging racial discrimination because, pursuant to the decree, the group of 81 promotees included allegedly less qualified minorities instead of them. The court-appointed monitor considered and rejected each complaint. Between August and October 1988, each of the seven plaintiffs filed a complaint with the California Department of Fair Employment and Housing, also alleging racial discrimination. The Department closed each case.

Defendants were granted summary judgment on all counts. Although neither the *Van Pool* plaintiffs nor the local signed the 1988 decree, Judge Patel found that the *Van Pool* plaintiffs were precluded from collaterally attacking the legality of the decree and the promotions made pursuant to it, because plaintiffs' precise arguments had been articulated by the local and considered and rejected by the district court 46/ and the Ninth Circuit. 47/ Moreover, the local in the decree case and the *Van Pool* plaintiffs were in privity and had an identity of interests. Because the local had been permitted to intervene and had fully participated in the decree case, and because it had completely exhausted all of the arguments later raised by the *Van Pool* plaintiffs, *Van Pool* fell under the "adequate representation" exception of *Martin*. 48/

Plaintiffs knew they could appeal both types of complaints in court, but chose not to.

46/ *United States v. City & County of San Francisco*, 696 F. Supp. 1287 (N.D. Cal. 1987).

47/ *Davis v. City & County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990).

48/ *Martin*, 109 S. Ct. at 2184 n.2 ("We have recognized an exception to the general rule [that a non-party's rights cannot be determined by a judgment among the parties to a lawsuit] when, in certain limited circumstances, a person, although not a party, [*i.e.*, the *Van Pool* plaintiffs] has his interests adequately represented by someone with the

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2. Albano v. City & County of San Francisco

Van Pool was originally brought as a class action. When defendants stated at a pre-trial conference that they would oppose class certification, counsel for plaintiffs offered to withdraw his motion for class certification and bring a new lawsuit, alleging identical claims to those in Van Pool, as a vehicle for relief for approximately 40 firefighters who had wanted to join the Van Pool plaintiffs' case. True to his word, shortly thereafter, counsel for the Van Pool plaintiffs filed Albano v. City & County of San Francisco. 49/ At the December 10, 1990, hearing, after announcing that she would grant summary judgment on all claims for defendants in Van Pool, Judge Patel, who had frozen all proceedings in Albano, suggested that counsel for plaintiffs drop Albano since the claims were identical to those in Van Pool, and summary judgment would thus be the inevitable result if Albano proceeded. Counsel for plaintiffs asked Judge Patel to repeat this explanation before his clients in Albano, which she did at a hearing in late January. Another hearing is scheduled for late

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same interests who is a party [i.e., the firefighters' union local]" (citations omitted).)

49/ No. C-90-2903 MHP (N.D. Cal. filed Oct. 11, 1990).

February, by which time counsel for plaintiffs will have resolved whether to drop *Albano*.

3. *Ratti v. City & County of San Francisco*

A case has been filed against the San Francisco police department challenging a 1979 consent decree governing departmental hiring and promotions. 50/ On October 26, 1990, defendants moved for summary judgment on the grounds, *inter alia*, that plaintiffs lacked standing, were unable to make a *prima facie* case of discrimination, and were barred by the statute of limitations and a

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50/ *Ratti v. City & County of San Francisco*, No. C-89-3577 RFP (removed to N.D. Cal. on Oct. 3, 1989, from state court, where it was filed on Sept. 25, 1989). *Ratti* is being heard before Judge Peckham, who entered the 1979 decree and has continuing jurisdiction over it. The decree was entered in settlement of class action litigation brought in 1973 by an organization of minority and female police officers and police officer applicants known as Officers for Justice. The suit alleged that the department discriminated by race and sex in its hiring, promotional, and job assignment practices in violation of Title VII, §§ 1981 and 1983, and state law. This action was later consolidated with a suit brought by the United States in 1977 alleging similar claims. *See Officers for Justice v. Civil Service Comm'n*, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) (upholding the lawfulness of the decree).

The *Ratti* plaintiffs are seven white police officers suing on behalf of a class of all those similarly situated. Plaintiffs challenge the city's actions taken pursuant to the decree, charging that the city has discriminated against white male officers by, *inter alia*, giving preference to minorities and women in making promotions and job assignments, in violation of state law, § 1981, and the Fourteenth Amendment.

modification to the decree entered in 1986. That modification, which the police officers' collective bargaining agent, the Police Officers' Association (POA), signed, limits its members to a dispute resolution procedure (rather than litigation) should they wish to protest the results of a promotional exam. 51/

Defendants also argue that Martin does not change the basic principles of preclusion and that the POA's active participation in negotiations leading to the decree constituted "adequate representation" of plaintiffs' interests in the underlying decree case. Plaintiffs argue that Martin makes summary judgment inappropriate. Plaintiffs argue that under Martin they have standing and have alleged sufficient facts to constitute a prima facie case. The plaintiffs argue that the participation of the POA in the Officers for Justice litigation and decree negotiations is irrelevant under Martin. Moreover, according to plaintiffs, Mann, see supra p. 23, makes clear

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51/ All seven Batti plaintiffs are POA members. The POA was a defendant-intervenor from the earliest days of the Officers for Justice litigation, and signed the 1979 decree on behalf of its members. The POA was also involved in six years of subsequent litigation on behalf of its members against the department's relative weighting of various components of promotional exams given pursuant to the decree. See San Francisco Police Officers' Ass'n v. City & County of San Francisco, 869 F.2d 1182 (9th Cir. 1988), cert. denied, 110 S. Ct. 68 (1989) (summarizing litigation).

that the "adequate representation" exception of *Martin* does not apply. The motion is fully briefed and under submission and the parties await a date for oral argument.

4. *Bernardi v. Yeutter*

There is also litigation against the Forest Service 52/ challenging a consent decree reached in 1981. 53/ Proposed intervenors, a prospective class consisting principally of the service's white male employees, allege that the service's refusal to hire, promote, or train men, and its hiring, promotion, and training of women instead pursuant to the decree, constitute unlawful reverse sex discrimination in violation of, *inter alia*, Title VII and the Fifth Amendment. Alleging that *Martin* supported their attack, the proposed intervenors sought intervention in the decree case on February 28, 1990, nine years after the decree was entered. 54/ Intervenors

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52/ *Bernardi v. Yeutter*, No. C-1110 SC (N.D. Cal. filed Feb. 28, 1990), *appeal docketed*, No. 90-15550 (9th Cir. Mar. 26, 1990).

53/ The decree was entered in settlement of Title VII sex discrimination litigation brought in 1973 against the service by a class of its present and former female employees. *Bernardi v. Yeutter*, No. C-73-1110 SC (N.D. Cal. decree entered May 1, 1981).

54/ In their brief to the Ninth Circuit, appellants explain that despite their lack of timeliness, they chose not to collaterally attack the decree through an independent reverse discrimination lawsuit (*i.e.*, the course that *Martin*

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obtained a temporary restraining order from the general duty judge blocking further promotions pursuant to the decree, and moved for a preliminary injunction to the same effect. Judge Conti, who has had continuing jurisdiction over the decree since approving it in 1981, then took over the case. On March 2, 1990, he vacated the two day-old TRO and denied intervenors' motions for preliminary injunctive relief and intervention. Intervenors have taken an appeal as to all rulings. The appeal is fully briefed and oral argument will be held before the Ninth Circuit on March 12, 1991.

5. Davis v. City & County of San Francisco

A case has been filed against the San Francisco Unified School District, 55/ which challenges a consent decree entered in settlement of litigation begun in 1978. The decree, entered in 1983, 56/ provides goals for the

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might permit), but rather sought intervention because "the 'consent decree' now has a vitality of its own."

55/ Davis v. City & County of San Francisco, No. C-90-0286 TEH (removed to N.D. Cal. the day after being filed in state court on January 29, 1990).

56/ San Francisco NAACP v. San Francisco Unified School District, No. C-78-1445 WHO (N.D. Cal. decree entered DATE 1983). Plaintiffs in the decree case were black parents, suing on behalf of their children, and the local NAACP chapter. Plaintiffs also sued on behalf of a class of all school age children who were or might become eligible to attend schools in the district. Plaintiffs sued the district and its board and superintendent, among others, alleging that defendants maintained a segregated school employment of minority teachers. Plaintiffs, nine white teachers, both male and female, allege that defendants discriminated by race, sex, and/or national origin in hiring and promoting minority teachers pursuant to the decree, and in thereby denying plaintiffs jobs and tenure. Plaintiffs proceed under Martin and seek relief under Title VII and § 1983, as well as under state statutes and case law. Plaintiffs claim injury in the form of lost earnings, including wages and job benefits. Plaintiffs seek an injunction blocking the district from continuing to promote and hire minority teachers pursuant to the decree. The court dismissed all of the defendants except the school district: the city, the county, and the mayor on the grounds that the school board is a separate entity, and the board members by stipulation. The case was reassigned to Judge Orrick, who entered the decree and has continuing jurisdiction over it.

Plaintiffs moved to certify a class of all white teachers, and the school district as well as the plaintiffs in the underlying decree case filed papers opposing the motion on the grounds that the class allegations were legally deficient. At a combined hearing in this case and

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system in violation of state and federal law, and sought an order desegregating the district.

the 1983 decree case on January 24, 1990, the court denied class certification.

6. Fowler v. City & County of San Francisco

This case 57/ was brought against the San Francisco Community College District. Plaintiffs, five white teachers, both male and feamle, allege that they have been passed over for promotions to teaching vacancies in favor of less qualified minorities, pursuant to an affirmative action plan adopted by the district in 1976. Plaintiffs allege that defendants' refusal to promote them constitutes unlawful race discrimination under §§ 1981 and 1983, Title VII, and state law. The city, the county, and the mayor have been dismissed as defendants, leaving only the district, the city college, its chancellor, and members of the district's governing board as defendants. Defendants have also succeeded in having the state law claims dismissed.

Defendants have informed plaintiffs that irrefutable statistical evidence demonstrates that the district has not given preferential treatment to minorities in hiring and promotion. Accordingly, the parties have agreed to submit the case to a court magistrate, to whom

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57/ No. C-90-0288 DLJ (removed to N.D. Cal. the day after being filed in state court on Jan. 29, 1990).

defendants will proffer this evidence, and who has the authority to settle the case. Plaintiffs have indicated that they have no interest in pursuing the case if this evidence bears out defendants' claim.

7. Petersen v. City of Oakland

Finally, a case has been filed against the Oakland fire department 58/ challenging a 1986 consent decree (also entered by Judge Orrick) that governs hiring in the department. 59/ Plaintiffs, ten white and Hispanic males who had applied for firefighter positions with the department 60/ joined by a dissident union local, brought their action before Judge Orrick. Plaintiffs collaterally attacked the decree, explicitly citing Martin as their authority. Plaintiffs alleged that in making hiring

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58/ Petersen v. City of Oakland, No. C-89-2784 WHO (N.D. Cal. filed July 27, 1989).

59/ Nero v. City of Oakland, No. C-85-8448 WHO (decree entered May 1, 1986). The decree was entered into in settlement of an employment discrimination case brought against the city in 1985. Plaintiffs in the decree case had alleged unlawful race and sex discrimination pursuant to §§ 1981 and 1983. The decree governs hiring by the department, and provides for the hiring of women and minorities (i.e., blacks, Hispanics, Asians, and Native Americans).

60/ Plaintiffs were not eligible to be hired in the next round of hiring for firefighters, but they feared that when they became eligible in the future, they would be passed over in favor of minority and female applicants with lower scores on the entry level examination.

decisions pursuant to the decree, the department was engaging in unlawful race and sex discrimination in violation of the due process and equal protection clauses of the Fourteenth Amendment, and California state law.

Plaintiffs sought a TRO and subsequently a preliminary injunction, seeking to enjoin further hiring pursuant to the decree. On December 12, 1989, Judge Orrick denied both applications. Since then, the parties to Petersen, as well as counsel for the Oakland Black Firefighters Association (representing plaintiffs in the decree case) and counsel representing the interests of minorities and women, have been negotiating a modification to the decree. The modification, to which all parties have agreed in principle, would extend the decree, presently scheduled to expire on May 1, 1991, by five years for minorities and ten years or ten classes of hirees (whichever occurs first) for women. The other significant decree modifications are (1) adding new events to the entry-level examination, and (2) adding physical fitness testing to the promotional examinations for all ranks through captain (such testing is now only part of the entry-level examination). Final agreement on decree modification and settlement of Peterson is expected before the decree expires.

G. *Boston, Massachusetts*

Three cases have been brought in Boston challenging established affirmative action plans on the basis of *Martin*. 61/

1. *Fagan v. City of Boston*

Fagan was brought by 35 white males and females who passed the examination for the entry-level police officer position given in March 1988, but alleged that they had been passed over for hiring in favor of blacks and Hispanics with lower exam scores. Plaintiffs sued the city, the mayor, the police commissioner, and the state personnel administrator alleging reverse race discrimination under § 1983 and the Fourteenth Amendment. Defendants' hiring decisions were made pursuant to an order entered by Judge

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61/ *Fagan v. City of Boston*, No. 89-2076-N (D. Mass. filed Sept. 21, 1989); *Mackin v. City of Boston*, No. 89-2025-N (D. Mass. filed Sept. 14, 1989); *Stuart v. Roache*, No. 89-2348-Mc (D. Mass. filed Oct. 19, 1989). A case known as *Guiney v. Roache*, No. 90-10113-Z (D. Mass. filed Feb. 1990), challenging the same decree as the *Stuart* case, was combined with *Stuart* on March 23, 1990. Several other state court cases challenging the decree at issue in *Stuart* were removed to federal court and are being heard together with *Stuart*. *See Guiney v. Haley*, No. 90-3375 (Superior Court filed June 11, 1990), *Boston Police Patrolman's Ass'n v. Roache*, No. 90-3375 (Superior Court filed June 11, 1990), *Boston Police Superior Officers Fed'n v. Civil Service Comm'n*, No. 90-0515-E (Superior Court filed Jan. 26, 1990).

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Wyzanski in 1973, 62/ which plaintiffs allege unlawfully requires race-conscious hiring. Alternatively, plaintiffs allege that defendants violated the order by hiring unqualified blacks and Hispanics, and that the decree should expire because its goal of hiring firefighters in accord with the city's population had been met. Plaintiffs seek a permanent injunction against the hiring of blacks and Hispanics solely on the basis of race, and an order placing them atop the eligibility list for hiring.

Plaintiffs in Castro were permitted to intervene as defendants in Fagan, and joined defendants in opposing plaintiffs' motion for preliminary injunctive relief barring

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62/ Castro v. Beecher, 365 F. Supp. 655 (D. Mass. 1973). The decree was entered in settlement of litigation brought by a class of black and Hispanic applicants for the police officer position. The suit was brought against the city and the State of Massachusetts, alleging that the state civil service system discriminated by race against black and Hispanic police officer applicants in communities throughout the state in hiring, recruitment, and testing. Judge Wyzanski found that the exams had disparate impact. The court retained continuing jurisdiction over the order and issued a series of orders in the form of consent decrees mandating the promulgation of job-related exams and minority recruitment plans, as well as the certification, on a priority basis, of black and Hispanic applicants who passed a valid entrance exam, and which also governed the administration of subsequent police officer exams, the certification of those candidates who passed the exams, and the exemption of communities around the state from the decrees as they met their hiring goals, which were tied to the local minority population. Since Judge Wayzanski has taken senior status, the Castro case has been reassigned to Judge Caffrey.

the city from hiring blacks and Hispanics with lower exam scores in their stead. That motion is pending, and the city continues to hire police officers. Defendant-intervenors and defendants have also moved to dismiss and for summary judgment, and plaintiffs have also moved for summary judgment. Defendant-intervenors argue that plaintiffs' interests were represented by a class of white applicants for the police officer position who were granted leave to intervene as defendants in the *Castro* litigation in 1971 by Judge Wyzanski. This class's interests were fully considered, and its claims were rejected, by Judge Wyzanski. 61/ The white applicants thereafter participated in negotiations over Judge Wyzanski's original order. Plaintiffs rely on *Martin* in opposing defendant-intervenors' motion to dismiss. Defendant-intervenors argue that *Martin* is distinguishable because plaintiffs' interests were fully represented by the class of white applicants in *Castro* and *Powell*, and also argue that "parity"--hiring in the police department in accord with the minority population--has not

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61/ *Castro v. Beecher*, 334 F. Supp. 930, 945 (D. Mass. 1971), *aff'd*, 459 F.2d 725 (1st Cir. 1972). *See also Powell v. Commonwealth of Mass.*, No. 76-3350-G (D. Mass. filed Sept. 14, 1976) (dismissal of claims of class of white applicants, affirmed in 1977 by the First Circuit).

been achieved. The motions are fully briefed and pending before Judge Wolfe.

2. Mackin v. City of Boston

Mackin was brought by a group of white males who passed the examination for the entry-level firefighter position in the city fire department in December 1987, and were passed over for hiring in favor of blacks and Hispanics who scored lower on the exam. Plaintiffs sued the city, the mayor, the fire commissioner, and the state personnel director, alleging violations of § 1983 and the Fourteenth Amendment. Defendants were acting pursuant to a consent decree, 64/ which plaintiffs allege unlawfully requires race-conscious hiring in the fire department.

64/ Boston Chapter, NAACP v. Beecher, 371 F. Supp. 507 (D. Mass), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 924 (1975). The decree was entered by Chief Judge Freedman in 1974, in settlement of litigation brought by, inter alia, the NAACP, under §§ 1981 and 1983, on behalf of black and Hispanic applicants for the firefighter position throughout the state. The suit, against the city and the state, alleged that the state civil service system discriminated because of race against minority firefighter applicants in recruitment, hiring, and examinations. The court found that the exams had adverse impact and were not job-related, enjoined their further use, and ordered the state to promulgate valid exams, and to hire, on a priority basis, black and Hispanic applicants who passed a valid entrance exam. The court, after this initial order, issued a series of consent decrees governing examinations, certifications of candidates who passed entrance exams, and exemptions of communities around the state from the decrees as they met their hiring goals, which were tied to the local minority population.

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Alternatively, plaintiffs allege that the decree should expire because its goal of hiring firefighters in accord with the city's population has been met since 1987. Although the percentage of minorities in Boston has increased since 1974, plaintiffs would still use 1974 population statistics to measure whether, in 1990, the city had met the decree's goal. Plaintiffs sought preliminary and permanent injunctions against the preferential certification of blacks and Hispanics solely on the basis of race, and placing them atop the eligibility list for hire.

Judge McNaught, who had inherited continuing jurisdiction over the decree from Chief Judge Freedman, denied the motion for preliminary injunctive relief. Plaintiffs' proposed injunction would have required the city to hire firefighters in rank order from the roster of candidates who had passed the entrance exam. Judge McNaught held that because even without any preferential certification of blacks or Hispanics pursuant to the decree, there would be still be approximately 175 candidates ahead of plaintiffs on the eligibility roster, plaintiffs could not make the requisite showing of irreparable harm to obtain injunctive relief.

The Boston Chapter of the NAACP, one of the plaintiffs in the NAACP action, successfully sought intervention in Mackin as a defendant on behalf of itself and a class of black and Hispanic applicants for firefighter positions throughout the state. The United States successfully moved to consolidate the *NAACP* and *Mackin* cases. *65*/

Cross-motions for summary judgment have been filed, but in the interim Judge McNaught has retired and a ruling must await the assignment of a new judge to the *Mackin* and *NAACP* cases. Defendant-intervenors and the state personnel administrator argue that *Martin* did not create any new causes of action and that plaintiffs have yet to show that the circumstances that gave rise to the court's 1974 order have changed sufficiently to warrant the modification or dissolution of the decree. They also argue that "parity"--hiring in the fire department in accord with the minority population as of 1990--has not been achieved. As defendant-intervenors explain, "plaintiffs may have obtained the right to bring this challenge before the Court as an initial matter [under *Martin*], but they may only pursue

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65/ The United States moved in *United States v. City of Boston*, No. 73-269-F (D. Mass. filed 1973), a case it brought against the city, the fire commissioner, and the state civil service commission, under Title VII and §§ 1981 and 1983, alleging race discrimination in hiring for the firefighter position. *United States v. City of Boston* was quickly consolidated with the earlier-filed *NAACP* action. Thus, when *United States v. City of Boston* and *Mackin* were consolidated last year, *NAACP* became consolidated with *Mackin* as well.

their claims for relief if they can show those claims have merit. Thus far, they have failed to do so." The United States agrees that there have been no changes in law which affect the continued validity of the 1974 order.

3. *Stuart v. Roache*/*Guiney v. Roache*/*Guiney v. Haley*/*BPPA v. Roache*/*Boston Police Superior Officers Fed'n v. Civil Service Comm'n*

Stuart was brought by 33 white males and females employed by the city police department as police officers and detectives. The suit, brought under §§ 1981 and 1983 and the Fifth Amendment, alleges that the city, its mayor, its police commissioner, and the state personnel administrator have discriminated because of race in passing over plaintiffs for promotions to police sergeant, despite the fact that 29 of the plaintiffs were certified as eligible for promotion in 1988. Plaintiffs allege that defendants have promoted blacks with lower, though nonetheless passing, exam scores to police sergeant, pursuant to a consent decree. The decree was entered in 1978 by Judge McNaught, before whom *Stuart* was brought. 66/

66/ *Massachusetts Ass'n of Afro-American Police, Inc. v. Boston Police Dep't*, No. 78-529 (D. Mass. entered Sept. 16, 1980; extended on Oct. 31, 1985 because no goals had yet been met; further extended on Sept. 19, 1990 until such time as a first round of promotions is made from the eligibility list to be created by the next validated sergeant's

Plaintiffs challenge the validity of the decree and seek an order promoting them in accordance with their positions on the 1988 list, with pay and seniority computed retroactively to the date each was passed over, and a permanent injunction against race-conscious promotions of blacks to the police sergeant position.

Plaintiffs sought a TRO and a preliminary injunction against all promotions to sergeant until the 1988 list, which in the interim had been revoked, was reinstated. The list had been revoked because it violated the decree and because its validity had been compromised; a white police superintendent who helped to prepare the exam had also led a study group for white officers planning to take the exam. Plaintiffs alleged that Martin gave them the right to challenge promotional decisions taken pursuant to the 1978 decree even though they were not parties to that decree.

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promotional examination). The decree was entered in settlement of litigation brought in March 1978 against the city, the mayor and the state's personnel administration and civil service commission, alleging race discrimination. Plaintiffs' case was based on the findings in the Castro case, 334 F. Supp. 930 (D. Mass. 1971), that the police entrance exam discriminated in favor of whites, and on the scarce representation of blacks throughout the ranks of the Boston police department. Plaintiffs obtained relief specifically targeted at promotions within the police department: goals and timetables were established for promoting blacks to sergeant and the City was required to establish valid promotional procedures.

Plaintiffs cited Mann for the same proposition. The state and the city argued that Martin did not relieve plaintiffs of their heavy burden of proving the invalidity of the decrees, even if Martin permitted the challenge.

On June 27, 1990, Judge McNaught denied plaintiffs' motion, finding that plaintiffs had not shown a reasonable likelihood of success on the merits or that they were being irreparably harmed by the decision to revoke the 1988 eligibility list; another sergeant's test was scheduled for June 1991, and plaintiffs could sit for that exam. Judge McNaught also permitted the Massachusetts Association of Law Enforcement Officers (a successor organization to plaintiff in the decree case) to intervene as a defendant in Stuart. Plaintiffs have moved for summary judgment, applying the Supreme Court's decision in Croson to the promotional policy followed by defendants pursuant to the decree, and arguing that under Croson, this policy violates their rights. Defendant-intervenor cross-moved for summary judgment and was joined by all of the defendants. Defendant-intevenor and defendants argued that although Martin generally authorized the bringing of a Title VII suit by white employees disadvantaged by a consent decree, in this instance plaintiffs' case had been entirely undermined when Judge McNaught correctly reaffirmed that the decree was constitutional in his opinion of June 27, 1990. Both motions are fully briefed, and the parties await a new judge to be assigned to Stuart and the decree case in the wake of Judge McNaught's retirement.

H. Toledo, Ohio

Plaintiffs, nine white males who had unsuccessfully applied for entry-level firefighter positions in the Toledo city fire department, sued the city and the fire chief. 67/ The suit challenged a 1974 consent decree which governs hiring in the department. 68/ Plaintiffs allege that other non-minority candidates were hired in their stead pursuant to the random selection process mandated by the decree, despite plaintiffs' higher scores on the written exam. Plaintiffs seek to be hired in the next class of firefighters pursuant to a scheme under which non-minority firefighters would be hired strictly in order of their exam scores, thereby creating two hiring lists - one for minorities and one for non-minorities. The city moved to dismiss on the grounds that it had been held as a matter of fact in the decree case that different scores on

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67/ Bembenek v. Winkle, No. 90-CV-7016 (N.D. Ohio filed Jan. 16, 1990).

68/ Brown v. Winkle, No. C-72-282 (N.D. Ohio decree entered Nov. 27, 1974) (City of Toledo found to be intentionally discriminating because of race against minorities in the Fire Division). See Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981). The decree was entered by Judge Young in settlement of litigation brought in 1972 against city officials by a class of current and future black and Hispanic applicants for the firefighter position. Plaintiffs alleged that the department's employment policies violated the civil rights of blacks, Hispanics, and other minorities under §§ 1981 and 1983 and the U.S. Constitution.

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the written exam did not establish significant differences between candidates' qualifications and thus the city had been enjoined in the decree case from hiring anyone in strict order of exam scores. Plaintiffs cited Martin for the position that not being parties to the decree case, they were not bound by such a ruling. Accepting plaintiffs' argument, Judge Young on July 26, 1990, denied the motion to dismiss, even though he had specifically found that the factual issue had been litigated and decided in Brown.

The plaintiff classes in the decree case were then granted intervention as defendants in Bembenek and moved to dismiss on grounds similar to those stated in the city's earlier motion to dismiss, arguing that plaintiffs had no federally protected right under Martin or otherwise to be selected for hiring in rank order of their scores on the written exam. Judge Young denied the motion on February 8, 1991, again holding that Martin "affords plaintiffs the opportunity to raise a question of fact that was already resolved. . . . The message of the Supreme Court is . . . clear, and . . . this Court . . . is [now] required to disinter what it previously relegated to the mausoleum of extinct ideas." The city's motion for summary judgment remains outstanding but the court has made clear that plaintiffs will obtain a full hearing of their claims.

I. Cincinnati, Ohio

Four reverse discrimination cases are pending before Judge Rubin, three regarding the city's Division of Fire 69/ and one regarding the city's Division of Police. 70/

69/ A consent decree, over which Judge Rubin has had jurisdiction since 1986, governs hiring and promotion in the fire division. Youngblood v. Dalzell, No. 8774 (S.D. Ohio decree entered May 7, 1974). The decree was entered before Judge Porter in settlement of litigation brought against the city, its civil service commission, and its fire chief, among others, by two unsuccessful black applicants for the entry-level fire recruit position in the division. Plaintiffs represented a class of black applicants for employment with and black employees of the division. The applicants sought declaratory, injunctive, and affirmative relief, alleging that the city and various city officials were guilty of unlawful race discrimination in recruiting, testing, and hiring fire recruits as well as in promotions, in violation of §§ 1981 and 1983 and the Fourteenth Amendment. See Youngblood v. Dalzell, 625 F. Supp. 30 (S.D. Ohio 1985), aff'd, 804 F.2d 360 (6th Cir. 1986), cert. denied, 480 U.S. 935 (1987) (enforcing decree and dual lists, see infra pp. 61-62).

70/ Hiring and promotion in the police division is governed by a consent decree. United States v. City of Cincinnati, No. C-1-80-369 (S.D. Ohio decree entered Aug. 13, 1981). The decree was entered into by the city, the division, and the civil service commission in settlement of a 1980 lawsuit brought against them by the United States. The suit, seeking injunctive relief, alleged that defendants discriminated against blacks and women in hiring, promoting, and testing police officers. The Fraternal Order of Police - the collective bargaining unit for the police officers - was granted intervention as a defendant and participated in the decree negotiations. See United States v. City of Cincinnati, 771 F.2d 1161 (6th Cir. 1985).

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1. *Jansen v. City of Cincinnati*

The first fire case *71*/ was brought against the city and the civil service commission, among others, by five white males who were unsuccessful candidates for fire recruit. Plaintiffs allege that the refusal to hire them pursuant to the decree constitutes unlawful race discrimination under §§ 1981 and 1983, state law, and the U.S. Constitution. *72*/ The city hires fire recruits from

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71/ *Jansen v. City of Cincinnati*, No. 89-CV-79 (S.D. Ohio filed Feb. 2, 1989).

72/ On January 5, 1989, six months before *Martin*, the individuals who would be the plaintiffs in *Jansen* were denied intervention in *Youngblood* by Judge Rubin. *Youngblood v. Dalzell*, 123 F.R.D. 564 (S.D. Ohio 1989). Judge Rubin applied the Sixth Circuit's opinion in *Stotts*, *see infra* pp. 66-68 and notes 80 and 81, and held that the protectable interests of non-minority firefighters whose promotion (or in this case hiring) expectations were diminished by a reasonable consent decree were not significant enough to justify intervention under Federal Rule of Civil Procedure 24(a)(2). *Stotts* is one of the impermissible collateral attack opinions criticized in *Martin*, 109 S. Ct. 2185 n.3. *See supra* note 15. *See also Jansen v. City of Cincinnati*, 904 F.2d 336, n.3 (6th Cir. 1990).

On the same day, Judge Rubin ruled on his own initiative that the court would no longer oversee the enforcement of the 1974 decree. *Youngblood v. Dalzell*, 704 F. Supp. 137 (S.D. Ohio 1989). In an unreported opinion, the Sixth Circuit remanded, finding that Judge Rubin had not adequately addressed (1) the terms of the decree (which provides for continuing jurisdiction until a party moves for dissolution), or (2) the claims of continuing race discrimination brought by black plaintiffs in an enforcement action under the decree, which Judge Rubin had disposed of two lists - one for minorities and another for non-minorities, in an effort to comply with the goals of the decree. Plaintiffs state that but for the dual lists, their exam scores would have earned them positions as fire recruits. Plaintiffs allege that the decree never authorized dual lists, and in any event does not do so now, when the decree's hiring goals have been met. Alternatively, plaintiffs allege that to the extent the decree has ever authorized dual lists, it is unlawful.

On April 17, 1989, plaintiffs moved for summary judgment, alleging that these facts could not be disputed and that they had an absolute right to be hired. Plaintiffs sought to be hired and to receive damages, including retroactive salary payments and seniority benefits.

2. *Neal v. City of Cincinnati*/*Corry v. City of Cincinnati*

Judge Rubin consolidated *Jansen* with *Neal v. City of Cincinnati* 73/ and *Corry v. City of Cincinnati*, 74/ two other cases brought before him challenging the *Youngblood* decree on *Martin* - based grounds. *Neal* was brought by five

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as well. *Youngblood v. Dalzell*, No. 89-3141 (6th Cir. Feb. 14, 1991) (Westlaw, Federal Library, Allfeds file).

73/ No. C-89-479 (S.D. Ohio filed July 5, 1989).

74/ No. C-1-90-151 (S.D. Ohio filed Feb. 23, 1990).

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white male applicants for the firefighter position against the city, the civil service commission, the city manager, and the fire chief, alleging identical causes of action under §§ 1981 and 1983 and seeking identical relief as in *Jansen*. Plaintiffs in *Corry* are eight other white male applicants for the fire recruit position who were not hired into the 1989 entering class. (The *Neal* plaintiffs would have belonged to the same class, and the *Jansen* plaintiffs to the 1988 class.)

Defendant-intervenors *75*/ and defendants opposed plaintiffs' summary judgment motion on the grounds that the division had not yet been integrated at the promotional level, and that the city's selection procedures are still racially discriminatory. Defendant-intervenors argued that despite *Martin*, plaintiffs had not asserted meritorious claims. Defendants moved for summary judgment on May 23, 1989, and argued, along with defendant-intervenors, that the decree clearly permits the use of dual lists and numerical

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75/ Proposed defendant-intervenors representing the plaintiff class in *Youngblood* moved to intervene in June 1989. In July 1989, Judge Rubin denied intervention. On appeal, the Sixth Circuit reversed. *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990). *See infra* p. 84. Proceedings before Judge Rubin in *Jansen* were frozen during the pendency of the appeal.

goals, and that *Martin* was distinguishable. The cross-motions are pending before Judge Rubin.

3. *Vogel v. City of Cincinnati*

The police case 76/ challenges a similar system of multiple lists (one for white males, one for women, and one for black males) in the police division. The division uses the system in an attempt to comply with a decree entered in 1981, which still governs police hiring and promotion. Plaintiff, a white male candidate for the entry-level police recruit position who passed the entrance exam but was not hired, would have been hired but for the hiring of blacks and women pursuant to the multiple list system. Plaintiff sued the city, the city manager, the civil service commission, and the police chief, alleging that the decree did not authorize multiple lists, and alternatively that the decree is no longer valid because there were never any findings of prior discrimination by the city and the decree contains no goals or criteria upon the achievement of which it would terminate.

Plaintiffs' motion for preliminary injunctive relief (which would have barred the city from swearing in the 1989 class of police recruits) was denied by Judge Rubin

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76/ *Vogel v. City of Cincinnati*, No. 89-CV-683 (S.D. Ohio filed Oct. 5, 1989).

on January 16, 1990. Judge Rubin held that the public interest favored swearing in the new police recruits.

Alleging that the facts noted above were uncontested, plaintiff moved for summary judgment on October 11, 1990, and argued that "[t]he principles of equity articulated by the Court in Martin militate in favor of allowing plaintiffs to challenge the Consent Decree." Defendants and defendant-intervenors (the Sentinel Police Association, an organization of minority police officers representing plaintiffs in the decree case) moved for summary judgment, arguing that plaintiffs were not affected employees at the time the decree was entered into, and thus that Martin did not allow them a cause of action. The cross-motions are fully briefed and await Judge Rubin's decision.

J. *Memphis, Tennessee*

Three *Martin*-inspired cases are pending before Judge Horton. *77*/

1. *Aiken v. City of Memphis*

Aiken was brought by 25 white males holding entry-level police officer positions in the city police department. Plaintiffs challenge consent decrees entered in 1974 and 1979 *78*/ which govern hiring and promotion in the department. Plaintiffs all passed the promotional exam for investigator, but were passed over in 1989, pursuant to the

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77/ *Aiken v. City of Memphis*, No. 90-2069 (W.D. Tenn. filed Jan. 23, 1990); *Davis v. City of Memphis*, No. 90-2068 (W.D. Tenn. filed Jan. 23, 1990); *Ashton v. City of Memphis*, No. 89-2863 (removed to W.D. Tenn. on Sept. 26, 1989, after being filed in state court on Aug. 28, 1989).

78/ The 1974 decree (which was amended in 1981) was entered before Judge Welford in settlement of litigation brought against the city in 1974 by the United States under Title VII, § 1981, and the Fourteenth Amendment. The city's fire department and other divisions were charged with engaging in a pattern or practice of race and sex discrimination in hiring and promotion. The decree established hiring goals for all of the city's divisions. *United States v. City of Memphis*, No. C-74-286 (W.D. Tenn. decree entered Nov. 27, 1974). *See Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 570 (6th Cir. 1982) (reproducing decree), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). The 1979 decree was entered before Judge Welford in settlement of litigation brought against the city police department by the Afro-American Police Association on behalf of individual plaintiffs, charging race discrimination in promotions by the police department. *Afro-American Police Ass'n v. City of Memphis*, No. C-75-380 (W.D. Tenn. entered Mar. 21, 1979).

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decrees, by minority officers, some of whom had lower scores on the exam. Plaintiffs allege that these actions by the city, the mayor, and the director of police constitute unlawful race discrimination and violate their rights under Title VII, §§ 1981 and 1983, the Fourteenth Amendment, and state law. Plaintiffs seek an order which grants them back pay, promotion, and monetary and punitive damages.

2. Ashton v. City of Memphis

Ashton was brought by 27 white male police officers who suffered the same fate pursuant to the decrees in 1988. The Ashton plaintiffs challenge the same decrees as the Aiken plaintiffs, charge the same violations of law against the city, and seek the same relief.

3. Davis v. City of Memphis

Davis was brought by six white males employed in entry-level firefighter positions by the fire department. Plaintiffs challenge the 1974 United States v. City of Memphis consent decree, see supra note 78, and another consent decree entered in 1980, over which Judge McRae has been assigned continuing jurisdiction. 79/ Plaintiffs

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79/ The 1980 decree was entered before Judge McRae in settlement of a class action suit brought against the department in 1977 by a black male fire captain. This action was later consolidated with a 1979 discrimination suit brought against the department by a black male firefighter. Plaintiffs charged the department with race passed the promotional exams for fire lieutenant or fire investigator, but were passed over for promotions in favor of minorities with lower test scores, pursuant to the decrees. Plaintiffs allege that these actions by the city, the mayor, and the director of fire services constitute unlawful race discrimination and violate their rights under Title VII, §§ 1981 and 1983, the Fourteenth Amendment, and state law. Plaintiffs seek an order which grants them back pay, promotion, and monetary and punitive damages.

The Department of Justice has moved before Judge Gibbons in *Ashton* to consolidate these three cases with the three consent decree cases, and have them all heard by her. Judge Gibbons has inherited continuing jurisdiction of the *United States v. City of Memphis* decree, as well as of the *Afro-American* decree. Judge Gibbons has not acted in response to this motion. Defendants have moved for summary judgment in *Ashton* on statute of limitations grounds, but Judge Horton has not acted in response to this motion.

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discrimination in its hiring and promotion policies, in violation of Title VII and §§ 1981 and 1983. The 1980 decree contains hiring and promotion goals for the department and was intended as a supplement (for the fire department only) to the 1974 decree in *United States v. City of Memphis*. *Stotts v. Memphis Fire Dep't*, No. C-79-2441-M/*Jones v. Memphis Fire Dep't*, No. C-77-2104 (W.D. Tenn. decree entered Apr. 25, 1980). *See Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 573 (6th Cir. 1982) (reproducing decree).

Finally, defendants in Davis have moved to add the United States (plaintiff in United States v. Memphis) and the plaintiff class from the Stotts decree case as additional defendants, and defendants in Aiken have moved to add the United States and the plaintiffs from the Afro-American decree case as additional defendants - all on the grounds that without these defendants, they cannot obtain complete relief. Judge Horton has not acted in response to these motions.

K. Omaha, Nebraska

Four Martin-inspired cases are pending in federal court against the city's police division.

1. Palmer v. City of Omaha

Palmer 80/ was brought before Judge Strom. Plaintiffs, two white women holding entry-level police officer positions in the division and a third white woman who unsuccessfully sought employment as a police officer, sued the city, the mayor, the police chief, and the city personnel director, among others, under Title VII, § 1983, and the Fourteenth Amendment. Plaintiffs challenge a consent decree entered into by the city in 1980 which governs hiring and promotion in the division. 81/ Plaintiffs represent a class of all those similarly situated, which has not yet been certified. The first two

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80/ Palmer v. City of Omaha, No. CV-90-0-318 (removed to D. Neb. on June 29, 1990, after being filed in state court on May 7, 1990).

81/ Brotherhood of Midwest Guardians, Inc. v. City of Omaha, No. 79-0-528/United States v. City of Omaha, No. 80-0-631 (D. Neb. decree entered Oct. 23, 1980). The decree was entered by the city before Judge Robinson in settlement of these two suits, brought in 1979 and 1980 by a black applicant for the police officer position and the United States, respectively, charging race discrimination in hiring and promotion in the division. The two actions, against the city, the chief of police, and the personnel director, among others, were subsequently consolidated. See Griffin v. City of Omaha, 785 F.2d 620, 622-23 & n.2 (8th Cir. 1986).

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plaintiffs passed the promotional exam for police sergeant, but were passed over in favor of black males who ranked lower on the eligibility list for promotions. Plaintiffs claim that the city did not hire or promote women on an equal basis with men, did not establish valid selection procedures or adequate recruitment and training mechanisms, and maintained systems of subjective interviews and job assignments that discriminated against women. Plaintiffs claim that defendants' actions were in violation of the city charter and affirmative action plan and constituted sex discrimination. Plaintiffs sought a TRO and preliminary and permanent injunctions barring any promotions to sergeant until they were promoted. Plaintiffs obtained a TRO from the state court before the case was removed, which blocked all promotions to sergeant. Three other white officers (two male and one female) passed over for promotion to sergeant then intervened as plaintiffs, as did the police officers' union, all alleging identical claims to plaintiffs'.

On June 19, 1990, Judge Strom denied plaintiffs' application to extend the TRO entered by the state court, lifted the TRO, and denied plaintiffs' motion for preliminary injunctive relief. The city's defense was that it was required to pass over plaintiffs for promotions under the terms of the consent decrees, given the underrepresentation of blacks in the police sergeant position. The court found that plaintiffs had made no showing of irreparable harm, and that the city's reliance on the decrees was not misplaced. As to plaintiffs and intervenors' argument that, because of Martin, the decrees could not be enforced against them, Judge Strom held that Martin merely gave plaintiffs the right to bring this action, and that their claim of reverse discrimination was "the crux of the case and the ultimate issue for resolution by this court". The United States was then joined as a defendant. On August 29, 1990, defendants filed a motion to dismiss, pending the resolution of which all discovery has been stayed.

2. Keller v. City of Omaha

Keller v. City of Omaha 82/ was brought by two white female police officers alleging identical claims to those raised in Palmer, and also seeking a TRO and a preliminary injunction. Defendants have moved to consolidate Keller with Palmer.

82/ No. 91-0-051 (removed to D. Neb. on Jan. 23, 1991, after being filed in state court on Jan. 18, 1991).

3. Donaghy v. City of Omaha

Donaghy 83/ was brought by a white male police sergeant in the city police department against the city, the mayor, and the police chief under §§ 1981 and 1983, the Thirteenth and Fourteenth Amendments, and the municipal code. Plaintiff alleged that defendants' policies and practices, particularly the promotion of a black male sergeant to lieutenant in his stead, constituted discrimination against whites. Plaintiff alleged that the department promoted less qualified blacks over white candidates and that these promotions were not required by the decree and were in violation of the promotional order established by validated, job-related selection procedures which the city had in place. Plaintiff sought a permanent injunction against the city's practices.

A jury found in favor of the plaintiff against the city only, and awarded damages of $3,753. However, on April 6, 1990, Judge Robinson granted the city a directed verdict because plaintiff had not made out a prima facie case of discrimination, including any showing of discriminatory intent. Judge Robinson held that the city was acting in compliance with the uncontrovertedly valid

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83/ Donaghy v. City of Omaha, No. 88-0-321 (D. Neb. Apr. 26, 1988).

decree, and that plaintiff's citation of Martin for the proposition that defendants could not rely upon a decree to justify race-conscious promotional decisions was misplaced. (Plaintiff had proffered a jury instruction in this vein on the strength of Martin, which was also rejected.) Observing that plaintiff "has had his day in court" and failed to make his case, he entered judgment in favor of the city.

Plaintiff took an appeal on his § 1983 claim, 84/ which has been fully briefed and argued. Appellant again argues that but for the city's actions in purported compliance with the decree, he would have been promoted, and that the city's actions were unlawful and not required by the decree, and now relies on Wilks to argue that the decree should in any event not apply to him since he was not involved in the decree case. The parties await the panel's decision.

4. Cavanaugh v. City of Omaha

Cavanaugh 85/ was brought by a white male police sergeant against the city, the mayor, and the police chief, among others, under §§ 1981 and 1983 and the Fourteenth

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84/ Donaghy v. City of Omaha, No. 90-1780 NE, appeal docketed (8th Cir. 1990).

85/ Cavanaugh v. City of Omaha, No. 89-O-849 (D. Neb. filed July 27, 1989).

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Amendment. Plaintiff alleges that individuals who were less qualified than him (according to their exam scores) were promoted to lieutenant in his stead solely on the basis of their gender and/or race. Plaintiff sought a TRO, preliminary and permanent injunctions barring all promotions by the city to police lieutenant, and a promotion. Judge Strom denied the TRO on March 29, 1990, finding that because plaintiff would obtain back pay and retroactive seniority if he prevailed, he could not make the neccessary showing of irreparable harm.

5. Wade & Invener v. City of Omaha

Wade & Invener 86/ is a reverse discrimination case brought in state court by a white male occupying the entry-level police officer position in the city department, alleging that the city's promotions to police sergeant pursuant to the 1980 decree violate his constitutional rights.

6. Administrative Proceedings

Finally, there are nine administrative proceedings presently pending before the Nebraska Equal Opportunity Commission (NEOC). In each one, plaintiff alleges that he or she has been unlawfully discriminated against by race in

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86/ Wade & Invener v. City of Omaha, No. 871568 (Douglas Co. Dist. Ct. filed Sept. 16, 1988).

not being promoted by the division to the sergeant's position. Five of the proceedings were brought in September or October 1989, and four more were filed in 1990. Plaintiffs all claim that the division unlawfully passed them over, pursuant to the decree, in favor of minorities who scored lower than them on the promotional exams. The city has argued that the NEOC does not have jurisdiction over these claims. All nine plaintiffs have moved to compel discovery in a consolidated proceeding in state court.

L. Cleveland, Ohio

In 1986, two cases were brought challenging a 1983 consent decree governing hiring and promotion in the city fire department.

1. Local Number 93 v. City of Cleveland

In Local Number 93, 87/ the union local, representing the majority of the city's firefighters (on behalf of a class of white firefighters), and one member of the union, a white male employed by the department in the entry-level position of firefighter, sued the city, the mayor, the civil service commission, and individual city officers. Plaintiffs alleged that defendants had discriminated against them in refusing to promote them, 88/ instead promoting minorities pursuant to the decree who had lower exam scores. Plaintiffs claimed a violation of

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87/ Local Number 93 v. City of Cleveland, No. C-86-2858 (N.D. Ohio filed July 18, 1986).

88/ The decree, Vanguards v. City of Cleveland, No. C-80-1964 (N.D. Ohio decree entered Jan. 31, 1983), aff'd, 753 F.2d 479 (6th Cir. 1985), aff'd sub nom. Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986), was entered in settlement of class action litigation brought against the city and various municipal employees in 1980 by the Vanguards, an organization of black and Hispanic firefighters, on behalf of a class of black and Hispanic firefighters and present and future applicants for the firefighter position. Local 93 was a party throughout the course of the decree litigation.

Title VII and §§ 1981 and 1983, and sought declaratory relief and damages.

2. *Copperman v. City of Cleveland*

In *Copperman*, 89/ five white male firefighters sued the city. Plaintiffs had passed the promotional exams and been passed over for promotion by minorities with lower exam scores, pursuant to the decree. Plaintiffs charged that these actions by the city pursuant to the decree constituted unlawful racial discrimination in violation of their rights under Title VII and § 1983. Plaintiffs seek back pay. Both cases were brought before Judge Lambros, who entered the 1983 decree and has continuing jurisdiction over it. The Vanguards intervened as defendants in both cases on behalf of the plaintiffs in the decree case.

Defendants and intervenors filed motions to dismiss in both cases, arguing that plaintiffs were barred by *res judicata* from relitigating issues decided against them by the district court, the court of appeals, and the Supreme Court in the decree case. *See supra* note 88. The Vanguards also argued for dismissal in both cases based on the doctrine of impermissible collateral attack. Judge Lambros did not rule on the motion prior to *Martin*. After

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89/ *Copperman v. City of Cleveland*, No. C-86-2389 (N.D. Ohio filed June 5, 1986).

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Martin. Judge Lambros ordered the parties in both cases to submit briefs on the question of the applicability of Martin to the pending motions. Defendants and intervenors in the Local 93 case have renewed their motion to dismiss. They argue that Martin is inapplicable because Local 93 was an intervening defendant in the decree case, and thus res judicata remains an effective bar against Local 93's claims. The parties to Copperman have agreed to be bound by Judge Lambros' decision on the Local 93 motion to dismiss. The renewed motion has been fully briefed but Judge Lambros has not ruled on it. 90/

One reason for the delay is that Judge Lambros has linked the resolution of the two reverse discrimination cases to the pendency of a motion by the Vanguards to extend the terms of the consent decree in the original litigation. A modification which would have included the one-time promotion of large numbers of minorities and whites was rejected by the membership of Local 93 at the end of 1989. The city, now under a new administration, appears no longer interested in such a promotion, and a ruling on the motions to dismiss in Local 93 and Copperman seems likely.

90/ The parties have also agreed to treat the two 1986 cases as consolidated, although Judge Lambros has never ruled on defendants' motion in Local 93 to consolidate the cases, which is fully briefed and pending.

M. Pittsburgh, Pennsylvania

Two cases have been brought seeking to dissolve a 1975 injunction which governs hiring in the city's Bureau of Police under a system of multiple candidate lists, broken down by race and sex. 91/

1. Slater v. City of Pittsburgh

Slater 92/ was brought against the city by a white male applicant for police officer (later joined by two other white male applicants as intervenors) who passed the entrance exam but have not been hired, the city instead having hired white males, women, and minorities with equal or lower exam scores pursuant to the injunction. Plaintiffs allege that the city's refusal to hire them pursuant to the order constitutes unlawful race and sex discrimination in

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91/ Commonwealth of Pa. v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. filed Feb. 5, 1975; order entered Dec. 5, 1975). Flaherty was a class action brought against the city, the mayor, the police superintendent, and the civil service commission. It was brought by the State of Pennsylvania (on behalf of its citizens), the NAACP, NOW, and an organization of minority police officers. Plaintiffs alleged discrimination in the hiring, appointment, promotion, and working conditions of black and female police officers and applicants for the entry-level police officer position, in violation of §§ 1981 and 1983 and the Thirteenth and Fourteenth Amendments.

92/ Slater v. City of Pittsburgh, No. 90-457 (W.D. Pa. filed Mar. 15, 1990).

violation of Title VII and seek an order dissolving the 1975 injunction, and damages.

2. Boehm v. Masloff

Boehm [93] was brought by four white male applicants for police officer (only three of whom were later found to have valid claims), who passed the entrance exam but were passed over for hiring by women and minorities with lower exam scores pursuant to the injunction. The suit is brought on behalf of a class of white male applicants for police officer who have been excluded in this manner. Plaintiffs are suing the city, the mayor, the personnel director, and the civil service commission, alleging that defendants' refusal to hire them pursuant to the order, and hiring of lower-scoring minorities and women instead, violates their rights under state law and §§ 1981 and 1983. Plaintiffs seek an order dissolving the 1975 injunction and mandating hiring according to exam score, as well as damages.

Slater moved to intervene in Flaherty and petitioned for dissolution of the 1975 injunction. Judge Cohill sided with the city (and plaintiffs in Flaherty, who also briefed the motion), denying the motion and dismissing the petition, finding that Slater's low exam score, not the injunction, was the reason he was not hired, and that therefore he lacked standing to challenge the injunction. 94/ Thereafter, the Boehm plaintiffs and plaintiff-intervenors in Slater brought identical motions and petitions before Judge Cohill. 95/ Again, plaintiffs in Flaherty joined defendants in Boehm and Slater in opposing the motions and petitions, but although Judge Cohill dismissed the petition, this time he granted the motion to intervene and on his own initiative consolidated the cases, finding that three of the Boehm plaintiffs and the two plaintiff-intervenors in Slater had scored sufficiently high on the exam to make the 1975 injunction the reason for their not being hired, and to grant them standing to challenge the injunction. Plaintiffs' petition to dissolve the injunction has once again been fully briefed and argued, the Boehm plaintiffs explicitly relying on Martin to support their

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[93] Boehm v. Masloff, No. 90-629 (W.D. Pa. filed Apr. 18, 1990).

94/ Slater appealed the denial and dismissal to the Third Circuit, which affirmed on identical grounds in an unreported opinion. Slater v. City of Pittsburgh, No. 90-3411 (3d Cir. Dec. 13, 1990).

95/ Slater and Boehm were both brought before Judge Cohill, who was assigned continuing jurisdiction over Flaherty after Judge Weber, who entered the 1975 injunction, passed away.

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collateral attack, and the parties await Judge Cohill's decision.

IV. *Making the best of Martin v. Wilks*

In a few cases, minorities and women have been able to turn *Martin* to their advantage.

A. *Riddle v. Cerro Wire & Cable Group, Inc.* 96/

A female Title VII plaintiff's claim against her employer was allegedly barred by the EEOC's entering into a consent decree, on her behalf but without her participation, with the employer. The court held that there was an insufficient identity of interests between plaintiff and EEOC for *res judicata* to bar her claim.

B. *Jansen v. City of Cincinnati* 97/

A class of black applicants to and employees of the city fire department, which operated under a consent decree, sought intervention in a post-*Martin* reverse discrimination case brought by unsuccessful white applicants against the city. The court held that the city's response to the reverse plaintiffs' summary judgment motion failed to argue, *inter alia*, that the decree required the city to engage in race-conscious hiring, and thus the black class' legal interests, protected by the decree, would be

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96/ 902 F.2d 918, 921 (11th Cir. 1990).

97/ 904 F.2d 336, 339-42 (6th Cir. 1990).

prejudiced if intervention were not granted in the reverse case.

C. Bridgeport Guardians, Inc. v. City of Bridgeport 98/

The court held that the fact that the Guardians, one of the plaintiffs, agreed to a promotional process for the police sergeant position as part of a 1982 consent decree (to which the Guardians were a party), did not bar other plaintiffs to this 1989 suit - individual black and Hispanic candidates for police sergeant, and a second organization of minority police officers - from pursuing claims that the promotional process was racially discriminatory.

D. Richardson v. Lamar County 99/

Richardson received an Alabama state teaching certificate despite failing the certification test, pursuant to a consent decree reached in settlement of a suit against the state board in which Richardson was a member of plaintiff class. The county board now refused to renew Richardson's teaching contract on the grounds that she had failed the test, and Richardson brought a Title VII suit,

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98/ 735 F. Supp. 1126, 1132-33 (D. Conn. 1990).

99/ 729 F. Supp. 806, 811-13 (M.D. Ala. 1989).

alleging, inter alia, that the test had a racially disparate impact. The court held that the county board's res judicata defense - that Richardson's claim was barred by the consent decree - was insufficient because the state and county boards' interests were not aligned.

THE UNJUST WORK PLACE

The Impact of the *Patterson* Decision on Women

WOMEN'S LEGAL DEFENSE FUND
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THE UNJUST WORKPLACE:

THE IMPACT OF THE *PATTERSON* DECISION ON WOMEN

By
Claudia A. Withers and Lisalyn R. Jacobs**

The Civil Rights Act of 1991 is designed to restore fairness to laws prohibiting employment discrimination against women, religious, racial and ethnic minorities, disabled people, and the elderly. The legislation reflects the recognition that each of the cases decided by the Supreme Court in 1989 did concrete damage to the rights of women workers, disabled workers, older workers, and workers who are members of religious or ethnic minorities. These workers, who want only the opportunity to participate equally in the workplace, now face major roadblocks when they try to challenge discrimination. By eradicating these obstacles, each provision of the Civil Rights Act of 1991 will help all workers -- and their families -- to reap the benefits of justice in the workplace.

This report provides specific examples of how one of the 1989 Supreme Court decisions -- *Patterson v. McLean* -- affects working women of color. Because of *Patterson*, the women in this report were unable effectively to challenge racial harassment on their jobs, or most promotion denials, or *any* negative employment decision that did not fit within the Supreme Court's cramped reading of the law. Because the women in this report faced real limitations on the ways they could challenge their employers' discriminatory actions, workplace justice eluded them.

** Thanks also to Donna R. Lenhoff, Virginia Sassaman and Novella Abrams.

Patterson v. McLean

The plaintiff in this case, Brenda Patterson, worked as a teller at a credit union in Winston Salem, North Carolina -- the only black professional in the organization. Throughout her tenure at McLean Savings and Loan, Patterson was subjected to negative treatment based on her race. For example, she was told by a supervisor that "blacks are known to work more slowly than whites by nature." She was required to dust and sweep the floors and to perform other tasks not required of her white colleagues. Patterson also applied for, but was denied, promotions at the credit union.

Brenda Patterson decided to sue her employer under 42 U.S.C. §1981 ("§1981"), an 1866 civil rights statute that gives blacks and other people of color the same right to "make and enforce" contracts as whites. This provision, which frequently has been used to challenge employment discrimination, provides for a jury trial and an award of damages. Ms. Patterson alleged that she was denied the promotion she applied for because she was black, and further, that comments directed to her about blacks and the tasks to which she was assigned constituted racial harassment.

In 1988, Patterson's case went to the Supreme Court, which held that §1981 does not cover racial harassment on the job. Indeed, the Court ruled that §1981 applies only to discrimination in the actual making and enforcing of the employment contract -- e.g., hiring. Under this interpretation, an employer can discriminate with impunity once a worker is hired. Thus the Court's Patterson ruling effectively eliminated §1981 as an effective tool to eliminate many forms of workplace discrimination.

The Patterson Case Denies Women Workers An Avenue for Challenging Unjust Workplaces

Countless women like Brenda Patterson suffer from employment discrimination based on race, ethnicity, and national origin after they are hired; each woman who suffers such discrimination has been directly harmed by the Supreme Court's limitations on §1981 in Patterson. Before the Patterson ruling, women who challenged discrimination based on race and gender could bring claims under both §1981 and Title VII of the Civil Rights Act of 1964. Because the scope of §1981 has been severely limited, women victims of certain forms of discrimination based on race and gender -- such as harassment -- must now rely solely on Title VII, which prohibits employment discrimination based on race, color, national origin, and gender.

However, Title VII currently provides only the remedies of back pay and injunctive relief, so women cannot fully recover fully for the damages they have suffered. Thus, women of color may be able to recover pain-and-suffering damages under §1981 if they can prove race discrimination involving failure to hire, a discharge, or, in some situations, a promotion. But when they are discriminated against on the basis of their sex, or in the terms and conditions of their jobs, women of color -- like white women -- are limited to recovering back pay for their salary losses; where there is no salary loss, they can recover nothing.

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Regardless of whether employment discrimination is based on race or ethnicity, gender, or on a combination of gender and race or ethnicity, discrimination spells economic disaster for some nine million working women of color and their families. Women of color already fare worse in the labor market than either white women or men of color: women of color are "crowded" into the lowest paying female-dominated jobs, and as a result earn lower wages. Women of color are more likely to work part-time, not by choice, but because of the unavailability of full-time work. Because women are heads of households in nearly half of African American families and one-fifth of Hispanic families, their families are particularly vulnerable to the impact of discrimination. Fifty-three percent of African American families and 52 percent of Hispanic families maintained by working women are below the poverty level. Discrimination in the workplace against women of color that goes unremedied keeps them and their families in this terrible status quo.

The Cases Decided Since the Patterson Decision Illustrate How Women's Ability to Remedy on the Job Discrimination Has Been Limited

While Patterson and its implications are often discussed in abstract legal fashion, there is nothing abstract about the devastating impact that Patterson has had on working women as well as working men. As a result of Patterson, women and men striving to support their families have had no meaningful recourse when faced with horrendous harassment in the workplace; their choice has been either to tolerate the harassment or quit their jobs, thus risking their financial security. Some have been fired for discriminatory reasons. All have been hurt because Patterson forecloses their opportunity to get compensation for the terrible things they have been forced to endure in order to support their families.

Since the Patterson decision was issued in June of 1989, over 250 cases involving claims brought under §1981 have been heard at the federal district court level.[1] A significant number of these involved women -- women who were subjected to unlawful workplace discrimination but were left without the legal right to recover fully for that discrimination. Roughly 30 percent of the plaintiffs in the 208 federal district court cases in our study have been women. Of the 44 cases in our study with Patterson claims heard at the appellate level, 27 percent of the plaintiffs have been women.[2]

Of all the claims decided by the district courts, by far the largest number (70) that were found not actionable involved claims of discriminatory discharge.[3] In 39 instances, the court refused to

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[1] The NAACP Legal Defense and Education Fund, Inc., studied the impact of Patterson from the date of the decision, June 15, 1989, through November 1, 1989. While this report did not assess Patterson's impact on women specifically, it determined that a minimum of 96 §1981 claims were dismissed in the 50 federal district court cases that were decided in that five-month time-span. "The Impact of Patterson v. McLean Credit Union," NAACP Legal Defense and Education Fund, Inc., 1989.

Our study covers November 2, 1989, through February 18, 1991, when Patterson issues were decided in 208 cases in federal district courts and 51 cases in the circuit courts of appeal.

[2] In addition, in 12 district court and three appellate court cases, the plaintiffs were both women and men.

[3] There is currently disagreement among the circuits as to whether or not claims of discriminatory discharge remain actionable in the wake of Patterson. While seven of the circuits have held that

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consider claims of failure to promote, holding that the promotions did not rise to the level of a "new and distinct relationship."[4] Thirty-four claims of racial harassment were deemed not actionable under Patterson because the harassment took place after the formation of the contract. Finally, 27 claims were dismissed in the retroactive application of Patterson.[5]

Of the 44 Patterson cases at the appellate level, 13 discriminatory discharge claims were dismissed and five claims each of racial harassment and retaliation were barred by Patterson. In six

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discriminatory contract termination is not actionable after Patterson, the Tenth Circuit has refused to rule on the issue. On the other hand, the Eighth Circuit has held that discriminatory discharge is still actionable under §1981. In Kansas, judges fall evenly on both sides of the issue.

Thus the likelihood of people getting a full remedy for their claims of discriminatory discharge depends more on what court they end up in and which judge they stand before than on the strength of their claims.

[4] Following the holding in Patterson, courts have held that in order for a claim of non-promotion to be actionable under §1981, the promotion must rise to the level of an opportunity for a new and distinct relation between the employee and the employer (e.g. from law firm associate to partner; from hourly employee to salaried employee; from non-management to management; or the like). Other factors considered are the method of calculating salary, the required qualifications, daily duties and responsibilities, potential liability, and pension and other benefits. Generally, because the degree of change in employment status must be relatively high in order for a non-promotion claim to be actionable, blue collar workers have had a much more difficult time meeting the standard than have white collar workers. See e.g., Busch v. St. Xavier College, 1991 WL 5808 (N.D. Ill. 1991) where the allegations of an Indian woman that she was discriminatorily denied tenure were found actionable under §1981.

[5] The remainder of the claims addressed a variety of issues, including sex and race discrimination, sexual harassment, disparate treatment, national origin discrimination, retaliatory or constructive discharge, hostile workplace, and the like.

cases where plaintiffs had been awarded damages under §1981, the awards were vacated in retroactive application of Patterson.[6]

Thus, our study shows that the Court's Patterson ruling has greatly affected the ability of women to challenge unfair racially based workplace practices. Because of Patterson, workers are afforded less legal protection after they are hired than up until the moment when they enter into their employment contracts. Thus, women and men are unable to get full redress for the unlawful sexual and/or racial harassment, and other kinds of workplace discrimination, to which they are subjected. In the absence of damages relief, many employers will likely continue to subject working women and men to unjust acts of discrimination with virtual impunity. Working women will thus be undercut in their attempts to support their families.

The following seven stories of women who were negatively affected by the Patterson ruling demonstrate why America's working women need strong legislation to remedy its effects.

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[6] At the appellate court level, the remaining claims covered a variety of issues, including non-promotion, racial discrimination, retaliatory discharge and issues that were not addressed because the statute of limitations had expired, there was no requisite showing of intent, or the court simply declined to address the Patterson issues.

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Patricia Carroll
Houston, Texas

When she testified at a Houston hearing on the Civil Rights Act, Ms. Carroll, a black woman, told the following story:

"I began my employment with General Accident Insurance Company with ... six years of experience in casualty claims handling. I was hired as a senior representative handling ... claims and files in litigation. My work was highly commended ... until I expressed a desire to receive a promotion to supervisor when my supervisor left the company.

"As of the day my supervisor left, in January 1985, I was told to assume the supervisory duties as well as my own until they could find the 'best man for the job.' I continued to do both jobs and although no one else was hired I was not given the promotion.

"I pointed this out on several occasions and requested an official promotion. For four months I suffered emotional and physical stress from being overworked. ...

"In mid-April, I suffered a miscarriage, and on the day I returned to work a co-worker who felt sorry for me told me that I had been promoted three weeks earlier but that management did not want to tell me because they had hoped to be rid of me by that time.

"I confronted management about this and I was told that they forgot to tell me about my promotion. After I became supervisor, the job really became unbearable. I suffered through the following discriminatory incidents:

"First, management refused to let me interview or hire staff. They hired inexperienced adjustors, then harassed me when they succeeded under my direction. I also could not supervise most white staff members; only a black woman and a white woman with a Spanish last name. This had not been the case with previous supervisors nor had it continued after I left the company, and I was replaced by a white supervisor. ...

"Toward the end of July, I became aware of a rumor that I was to receive an unfavorable performance evaluation. I called the Affirmative Action Department before my evaluation, but they refused to look into the matter stating that I had no problem. I was called into a meeting by the claims manager. During the meeting my superior and branch manager badgered me, tried to make me sign false statements, and refused to follow written company procedures for handling evaluations. They reviewed me as below acceptable in all areas, without ever having given me written notice of the review, which is contrary to written company policy.

"I was also publicly humiliated in front of my staff or ignored altogether. Meetings would be scheduled and when I came into the room, they would simply ignore me. Files were also sabotaged in an effort to make me feel and look incompetent.

"By the time I gave up and left the company in September of 1985, I had been subjected to over 150 memos from my manager supposedly criticizing my work."

Ms. Carroll filed a charge of race discrimination with the Equal Employment Opportunity Commission and subsequently sued the company in federal court under §1981 and Title VII. A jury awarded her $34,000 in back wages, $26,650 for embarrassment and emotional distress, and

$119,300 in punitive damages. But because of the *Patterson* decision, when the company appealed, Ms. Carroll lost all but the $34,000 in back pay of her award.[7]

Ms. Carroll reflects, "the scars of the suit may heal but I will never get over the fact that the judicial system has failed me. I am an upstanding citizen ... The judicial system has made a mockery of people like me who base our lives on doing the best we can to make a positive impact in America."

Ms. Carroll can be reached through her attorney, Kurt Arbuckle, at (713) 961-5353.

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[7] *Carroll v. General Accident Insurance Co. of America*, 891 F.2d 1174 (5th Cir. 1990).

Paulette Ceesay
Philadelphia, Pennsylvania

Paulette Ceesay, a black woman, was hired by the employee benefits and actuarial consulting firm of Miller, Mason and Dickenson in April of 1987. But, as Ms. Ceesay's subsequent complaint of race and sex discrimination alleged, although she was hired as an actuary, she was assigned the inferior position of analyst; when she ultimately became an enrolled actuary, she was given neither the salary increase nor the increased responsibilities that usually accompanied such a position.

Additionally, she alleged that during the course of her employment, she was both sexually and racially harassed by her supervisor. In fact, Ms. Ceesay claimed her supervisor stated that she was neither given a raise nor increased responsibilities because she was "a single parent from the inner city." He told her that she was on the "mommy track" and that "the only thing he would let a woman do, as far as actuarial work was concerned, was to tie his shoe laces." Ms. Ceesay's supervisor also told her that he did not like her because she was "different," and he even began contacting other pension actuarial firms and informing them that he had a "single parent female available for hire." He pressured her to resign and warned her not to discuss his actions with anyone.

Because of the stress inherent in her work environment, Ms. Ceesay took a leave of absence. While on leave, she was fired.

Ms. Ceesay challenged these actions as sex and race discrimination under §1981 and Title VII. Because of Patterson v. McLean, however, Ms. Ceesay's discriminatory discharge claim was held not actionable under §1981.[8] Thus, she was unable to recover damages for the harassment she suffered. (The trial court also eliminated her claims for intentional infliction of emotional distress.)

Ms. Cessay's current whereabouts are unknown.

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[8] Cessay v. Miller, Mason and Dickenson, 1990 WL 121218 (E.D.Pa. 1990).

Brenda A. Coleman
Gulf Shores, Alabama

Brenda Coleman is a black woman who was hired as a delivery person by Domino's Pizza, Inc., in December of 1986. Described by her attorney as "dynamic" as well as a good employee, Ms. Coleman was promoted to the position of store president (manager) in the fall of 1987.

According to her attorney, Ms. Coleman was sent to re-open a seasonal store in Gulf Shores, Alabama, in March, 1988. After a disagreement with her regional manager, Ms. Coleman was fired. She filed a claim of sex and race discrimination under Title VII and §1981. Although Ms. Coleman had signed statements from people who worked under her stating that she did good work, the district court dismissed her §1981 claim of discriminatory discharge against Domino's. In reliance on Patterson v. McLean, the judge found her discriminatory discharge claim to be beyond the scope of §1981's protection.[9]

After the ruling, Ms. Coleman's attorney reports she reached a confidential settlement with Domino's on her remaining claims. The fact remains that the Patterson case severely limited the damages available to her for the discrimination which she alleged.

Subsequent to her discharge, Ms. Coleman worked for a number of food service operations -- but, in many cases, in non-managerial

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[9] Coleman v. Domino's Pizza, Inc., 728 F.Supp. 1528 (S.D. Ala. 1990).

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positions. She alleged that her dismissal from Domino's limited her opportunity for hiring in other food service chains.

Ms. Coleman's current whereabouts are unknown.

Denita Council
Pensacola, Florida

Denita Council, a black woman, was among the first four female fire-fighters ever hired by the Topeka, Kansas, Fire Department in 1985. But, according to Ms. Council, she was subjected to both sexual and racial harassment during the course of her employment as a firefighter there. For example, she alleges:

-- she was told by co-workers that they didn't like the idea that women had been hired by the Fire Department;

-- she overheard a lieutenant in the department telling some white fire-fighters that "the nigger doesn't have any business on this job;"

-- the same lieutenant referred to black people as "blackie;"

-- Ms. Council's co-workers told her that she was sometimes referred to as an "aggressive black bitch;"

-- while some firefighters testified that they had not heard any racial jokes or racial epithets while on the job, other fire-fighters, specifically all of those at Ms. Council's last fire station, testified that they had heard racial slurs and jokes while on the job;

-- less than two weeks after Ms. Council expressed a deep fear of snakes during a meeting at the firehouse, she was struck in the face by a dead snake which landed in her lap when she got into her car and lowered her sun-visor.

Ms. Council sued the Topeka Fire Department under §1981, Title VII, and other laws alleging race and sex discrimination. However, because of the Supreme Court's decision in Patterson v. McLean, Ms. Council's racial harassment claims under §1981 were dismissed.[10] Luckily, Ms. Council was able to settle her case, largely because she was suing a government entity that could be held liable under other

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[10] Council v. City of Topeka, Kansas, 1990 WL 11061 (D. Kan. 1990).

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laws. Otherwise, the *Patterson* case would have prevented Ms. Council from receiving full compensation for the horrible harassment she endured.

Following the conclusion of her case, Ms. Council quit her job. Indeed, while she worked at the Fire Department, her life was threatened, which prompted her ultimately to move to Florida, where she now works for the local school board.

Ms. Council can be reached through the Women's Legal Defense Fund at (202) 986-2600.

Teresa A. Foster
Topeka, Kansas

Teresa A. Foster, a black woman, began working at the Santa Fe Railway Company in Topeka, Kansas, in March of 1976 as its first female machinist apprentice. She continued working there after completing her apprenticeship.

According to Ms. Foster, during the course of her employment, she was subjected to sexually and racially harassing comments and actions. She was repeatedly subjected to unwanted touching of a sexual nature by male co-workers and a relief foreman. She was told on numerous occasions that hers was a "man's job" and that she was depriving a "man's family of the income." Also, her work atmosphere was rife with offensive racial comments and jokes -- e.g., "nigger," "no good nigger," "black nigger bitch," "nigger rigged," "coon," "niggerly," and "nigger shooters." Such actions by her foreman and co-workers traumatized Ms. Foster, and so aggravated her hyperthyroid problem that she ultimately had to have her thyroid removed.

In October of 1986, Ms. Foster was fired. She filed a claim in federal court for race and sex discrimination under §1981, Title VII and a state statute. However, the trial court ruled that Patterson v. McLean prevented her from getting any relief for her claims of racial harassment, thus limiting the amount of damages she could recover.[11] Ms. Foster was fortunate in two respects: 1) her case was settled out of court; and 2) her case would have been heard by a judge who was willing to consider allegations of racially-motivated discharge after

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[11] Foster v. Atchison, Topeka and Santa Fe Railway Co., 1990 WL 11062 (D. Kan. 1990).

Patterson.[12] Nevertheless, the *Patterson* ruling severely undercut her legal rights to redress the injustice she suffered in her workplace.

Ms. Foster can be reached through her attorney, Pantaleon Florez, at (913) 272-6699.

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[12] Because of *Patterson*, roughly half of the district court judges in Kansas no longer allow claims of discriminatory or retaliatory discharge to be brought under the rubric of §1981 claims. *See* note 3.

Joy Miller
Waltham, Massachusetts

Joy Miller, a black woman, began working as a teller at the Shawmut Community Bank in Waltham, Massachusetts, in February 1981. According to Ms. Miller, her co-workers and her managers made derisive racial and ethnic comments in her presence. While these comments were generally about Jews, it nonetheless made her uncomfortable as she assumed they made similar comments about her behind her back. Additionally, her supervisor subjected her to criticism in front of her colleagues, belittling her for trivial mistakes. This criticism intensified after Ms. Miller filed her complaint alleging violations of her civil and constitutional rights.

Ms. Miller also alleged that her supervisors delayed or denied her opportunities for job advancement. She recounted several instances when they promoted less-qualified white employees to the head teller position -- a promotion which Ms. Miller was repeatedly denied. Ms. Miller was also turned down for a job as a customer service telephone representative; despite recommendations from her supervisor -- who said that she functioned well under stress -- the interviewer denied her the position on the grounds that the job would be too stressful. Although the interviewer said Ms. Miller would be welcome to apply for the next position, the interviewer became hostile and defensive when Ms. Miller asked why she would be more likely to get the next position if it involved the same level of stress. Additionally, Ms. Miller was discouraged from applying for a job as a personal banker despite the fact that she was also qualified for this position. When she inquired about the position, she was told that it had been filled -- yet advertisements continued to run in the newspaper.

Ms. Miller recalls that she went to four attorneys, all of whom said she had been discriminated against but refused to take her case because of the difficulty of proving discrimination. A fifth attorney agreed to represent her. He commissioned a study which showed that promotions at Shawmut Community Bank were generally given at 14-18 month intervals, while Ms. Miller's promotion to customer service representative took 27 months. Also, in the 15-year period from 1972 to 1987, only one of Shawmut Community Bank's 40 managers was black; that person was fired within a year.

In court, Ms. Miller's claim of racial harassment under §1981 was dismissed after the Supreme Court's holding in Patterson.[13] The result was that Ms. Miller could not obtain damages for the harassment, criticism and slurs to which she was subjected.

Moreover, although Ms. Miller settled the remainder of her case, she had difficulty finding other banking employment in Boston despite the level of her experience; the banking jobs she did obtain were at entry-level positions.

Ms. Miller ultimately relocated to another state, where she currently works for a bank. However, her husband has been unable to find work there and remains in Boston.

Ms. Miller may contacted through the Women's Legal Defense Fund at (202) 986-2600.

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[13] Miller v. Shawmut Bank of Boston, N.A. 726 F. Supp. 337 (D. Mass. 1989).

Estella Teran
El Paso, Texas

Mrs. Teran, a Mexican-American woman and former employee of the El Paso Natural Gas Company, began working for the company in April of 1969 reading and charting gas usage.

According to her attorney at the Mexican American Legal Defense and Educational Fund (MALDEF), over the course of the 17 years Mrs. Teran worked for the company, it discriminated against her and other Mexican-American employees by consistently promoting white employees. In so doing, it bypassed the Mexican-American employees who trained those who were promoted. Told her qualifications were lacking when she asked why she had not been promoted, Mrs. Teran felt that she and other Mexican-Americans were often denied promotion in favor of lower graded, less qualified, and less experienced white employees.

After Mrs. Teran began inquiring about various promotions that had been denied her and others, she alleged she was ridiculed and embarrassed via company memoranda and in meetings with her supervisors. Without her knowledge, the company placed memoranda in Mrs. Teran's departmental file about alleged incidents of her misconduct -- including such petty matters as "loading up" on lettuce and salad dressing. She feels that this further impeded her attempt to be promoted, especially since the memoranda were in her file for one year before she discovered them.

According to Mrs. Teran, after she filed an internal grievance, the company attempted to force her to sign unfounded disciplinary action forms. Additionally, Mexicans-Americans employed by the company were generally treated as second-class citizens; the company's atmosphere was rife with comments such as "dumb Mexican," comments about the number of children Mexicans have, and the like.

When Mrs. Teran sought to file a complaint with the Equal Employment Opportunity Commission (EEOC) in September of 1986 alleging national origin discrimination and failure to promote, she discovered that several other Mexican-Americans were also filing charges against the company. The EEOC urged them to amend their complaints and to file a class action charge.

Mrs. Teran was fired three months after filing an amended EEOC claim. In March of 1989, the EEOC found "reasonable cause to believe that the ... company had retaliated against Mrs. Teran because of her pursuing [her] rights." She brought suit under Title VII, §1981, and the Age Discrimination Act challenging the discharge and harassment she experienced as national origin discrimination. But because of Patterson, she was denied relief for her discrimination and harassment claims.[14] While Mrs. Teran's Title VII and Age Discrimination Act claims remain, any remedy afforded her will be incomplete at best as she has lost the ability to recover damages for her harassment under §1981.

Unable to find employment after her discharge, Mrs. Teran currently runs a horse training school in El Paso, Texas.

Mrs. Teran can be reached through her attorney, Guadalupe Luna, at the Mexican-American Legal Defense and Education Fund in San Antonio, Texas, (512) 224-5476.

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[14] Teran v. El Paso Natural Gas Co., 1990 WL 41428, 51 FEP Cas. 1833 (W.D. Tex. 1989).

American Federation of
Government Employees, AFL-CIO

80 F Street, N.W.
Washington, D.C. 20001
(202) 737-8700

STATEMENT BY

JOAN C. WELSH, DIRECTOR
WOMEN'S DEPARTMENT
THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO

BEFORE

THE HOUSE COMMITTEE ON EDUCATION AND LABOR

IN SUPPORT OF

H.R. 1
THE CIVIL RIGHTS ACT OF 1991

FEBRUARY 28, 1991

STATEMENT OF THE
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Thank you for giving the American Federation of Government Employees, AFL-CIO an opportunity to express our support for enactment of the Civil Rights Act of 1991. As the exclusive representative of over 700,000 federal employees in 105 agencies, AFGE would like to encourage the prompt enactment of this important and historic legislation.

H.R. 1 is legislation with two simple goals: to restore and to strengthen the civil rights laws affecting employment practices. First, H.R. 1 restores equal employment opportunity law to where it was before June 1989, after a quarter century of judicial review and enforcement under six Presidential administrations. The Civil Rights Act does not address quotas or any other affirmative action mandate. Rather, it addresses the ability of victims to get into court and to prove discrimination.

Second, H.R. 1 strengthens Title VII by permitting victims of intentional discrimination to obtain monetary damages. It is significant that this new amendment would provide the first opportunity for most victims of sexual harassment to recover anything but attorney's fees for their suffering and injuries. The amendments to Title VII would clarify federal employee entitlement to interest on back pay awards consistent with the 1989 amendment to the Back Pay Act.

There has been some confusion over the right to receive interest on back pay in cases where federal employees prove unlawful discrimination. While most Federal judges have agreed that the recent Back Pay Act amendments provide authority for interest on federal employees Title VII back pay, the Equal Employment Opportunity Commission has flip-flopped in its regulatory enforcement of these rights and federal employees continue to receive inconsistent awards.

Title VII is also strengthened for federal employees by the extension of the statute of limitations. This bill increases the present thirty day filing period to ninety days for a plaintiff to file an action in court following notice of a final agency decision on his or her complaint. As in the case of providing interest to federal employees, this change merely equalizes the rights between employees of the federal government and all other employees who have always had a ninety day statute of limitations under Title VII. As you can imagine, a short thirty day period is often insufficient to decide whether to appeal an agency decision by initiating federal litigation against one's employer, let alone sufficient time to find and retain a lawyer and to properly file and serve notice on a government defendant in a United States District Court. Thus, the provisions of H.R. 1 strengthening and restoring Title VII reflect fairness, equal opportunity, and justice in the workplace for women and minorities.

AFGE's support for the Civil Rights Act is consistent with the position of a long list of non-partisan organizations and businesses which realize that 1991 is not the time for America to stand still, much less move backwards on civil rights. However, opposition to H.R. 1 can be expected from individuals and groups who will, again, proclaim that the legislation will result in quotas. AFGE urges this Committee to confront this misinformation early and conclusively so that this quota "red herring" will not become an excuse for opposition and basis for defeat.

Any logical reading of H.R. 1 conclusively reveals that it fails to provide for quotas. Indeed, if an employer were to adopt a quota-based selection procedure outside the context of a remedy for past violations, such an employment practice would be illegal. Everyday, employees represented by AFGE at the Equal Employment Opportunity Commission and at the Department of Labor, prosecute unlawful employment practices including the arbitrary establishment of quotas. In addition, attorney's fees are provided in Title VII for private attorneys to prosecute such violations, so there is an incentive to comply with the law.

AFGE believes that the proper response to illegal behavior by employers (especially, speculative future conduct) is not to weaken or to repeal civil rights laws, but to enforce those laws. AFGE members who are charged with enforcing the equal employment laws are confident that they can insure that the illegal use of quotas--whether or not the employer incorrectly responded to the provisions of H.R. 1--will be remedied and not tolerated. I note that nothing in H.R. 1 alters the historic Title VII inquiry into the results of employment practices rather than the motivation of such practices. Thus, the hypothetical employer who allegedly abandons a non-discriminatory hiring practice and adopts instead a quota-based practice on the misguided belief that such activity is required by H.R. 1 could not seek immunity from liability based upon supposed "good faith" compliance. Any such shifts in employment practices would be easily identifiable and just as easily corrected. Thus, while this quota phobia is unfounded and imaginary, it is also insignificant for any practical purposes other than as an academic crutch for the traditional opponents of equal opportunities for women and minorities.

Two comprehensive surveys by the United States Merit Systems Protection Board reveal that some 40 percent of all women working in Federal government jobs have experienced unlawful sexual harassment. Numerous other studies indicate that this problem is equally shared in the private sector. Reports by the General Accounting Office also document that employment discrimination continues at such rates in federal agencies that we conclude that the concept of the federal government's being a "model employer" is as yet still an ideal and not a reality.

A discrimination-free work environment is not only a statutory obligation, but it is also now a universal demand of working Americans. Indeed, no segment of society would today argue against this mandate. H.R. 1 provides tools that are required to prosecute the violators and compensate the victims of those basic rights first established in the Civil Rights Act of 1964. AFGE urges the prompt enactment of H.R. 1.

Thank you.

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* Organizational affiliation for purposes of identification only

February 26, 1991

Dear Members of the House Committee
on Education and Labor:

One of NOW Legal Defense and Education Fund's clients in a recent Title VII case, Lois Robinson, was scheduled to testify before this committee on February 27, 1991. As you will have heard by now, Ms. Robinson ultimately decided that reliving her case one more time would be too much of an ordeal. She decided however that she would like her statement to be read into the record if it would help other women, which we believe it will if it helps to convince Congress to amend Title VII.

We also request that this letter be included in the record of these proceedings. It addresses a frequently asked question about the availability to discrimination victims of damages under state fair employment practice statutes or common law tort claims. With the exception of a handful of jurisdictions, not including Florida where Ms. Robinson lives and works, state fair employment statutes and common law tort remedies are not viable alternatives or complements to the

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presently inadequate remedial scheme of Title VII.

A comprehensive survey of state statutes and common law remedies in all fifty states and the District of Columbia (performed in 1990 for NOW Legal Defense and Education Fund), which forms the basis for a law review article to be published this year by attorney Mary Wright, reveals that amendment of Title VII relief provisions would bring necessary protection to many victims of discrimination whose protection under state law is inadequate. This survey is on file with NOW Legal Defense and Education Fund. Its main disturbing findings are as follows:

Six states, home to at least 25 million Americans, have no fair employment practice statutes.

Ten states, home to another 31.5 million Americans have fair employment practice statutes which provide for less relief than Title VII.

Thirteen states (including Florida), home to at least sixty million Americans, have relief provisions modeled on Title VII -- which do not include compensatory or punitive damages.

While fourteen states provide for equitable relief (such as provided by Title VII) and compensatory damages, and two states provide for equitable relief and punitive damages, only six states and the District of Columbia[1] (home to only 47 million Americans) currently provide in their fair employment practice statutes the combination of equitable relief, compensatory damages and punitive damages that the Civil Rights Act of 1991 would provide.

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[1] Some states are counted under two different categories if they provide judicial and administrative agency alternatives for resolution of an employment discrimination dispute which offer different remedial options.

Clearly, Congress and the Administration cannot look to the states to provide the adequate remedies and disincentives for discrimination that Title VII currently lacks.

Nor do common law tort claims under state law provide a panacea for victims of discrimination. Ms. Wright's analysis of the most frequently pled tort claims used by discrimination victims -- intentional infliction of emotional distress, intrusion, wrongful discharge in violation of public policy, assault and battery, negligent hiring of discriminatory employees and tortious interference with employment rights/contractual relations -- reveals that many discrimination victims, who have suffered real injury which is noncompensable under Title VII, have difficulties making out some of the necessary elements of proof for such claims, which were not originally developed to encompass employment problems. For example, even plaintiffs who have suffered such egregious discrimination as Lois Robinson, who testified to this committee today about her case, could likely not win an intentional infliction of emotional distress case, which requires a highly subjective assessment of whether the conduct complained of was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society. In some states, including Florida, courts also require proof that the injury suffered is "medically significant" and may find against plaintiffs who can show no accompanying physical injury or medically prescribed course of treatment. Other tort claims present other problems ranging from unavailability in many states (intrusion) to low reported damage awards (assault and battery -- for example, only $1000 in punitive damages were assessed in *Ford v. Revlon, Inc*, 734 P.2d 580 (Ariz.1987), against a supervisor who held an employee in a chokehold while he ran his hands over her breasts, stomach and between her legs). Even if the claims are available and present opportunities for winning adequate damages, in many states worker's compensation statues preclude suit by providing that worker's compensation is an exclusive remedy for work-related injury. Finally, there have been rulings by a number of federal district courts (for example, in Colorado, Michigan, Missouri, Montana, Vermont, South Carolina, Alabama, California, Connecticut, Florida and Illinois) denying pendent jurisdiction over state tort claims when plaintiffs brought Title VII claims.

Again, it is clear that the damages available under common law tort causes of action cannot be expected to fill the remedial gaps left by Title VII, as unamended.

We urge this Committee and Congress as a whole to provide meaningful redress under *federal* law for the real and currently noncompensable injuries caused by discrimination.

Sincerely yours,

Alison Wetherfield

Alison Wetherfield
Director, Legal Program

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February 27, 1991

Mr. Reggie Jovan
U.S. House of Representatives
Washington, D.C.

Re: Hearings on 1990 Civil Rights Act--Damage Awards under Michigan Civil Rights Law

Dear Mr. Jovan:

I am very sorry that we were unable to provide you with someone to give live testimony on today's hearings. Mr. Pitt faxed you excerpts from his Law Review article surveying all published state appellate court decisions and Sixth Circuit Court of Appeals decisions interpreting Michigan employment law for the year 1990. This is an attempt to assist a little more by summarizing those cases and giving as much insight as I can in a short space and time about the range of jury verdicts in these cases in this state and what happens to them on appeal.

Of the 22 cases reviewed in Mr. Pitt's survey, the trial court had granted summary judgment to the defendant in nine of them, and the Court of Appeals reversed that summary dismissal in six of the cases. Two of the cases were lost by jury verdicts of no cause. In only four of the cases was there a report of jury verdicts awarding both economic and non-economic damages; and if you average those awards over the whole 22 cases reported, the average economic award is only $40,000.00, and the average non-economic award is only $27,500.00.

This superficial analysis of the reported cases for 1990 does not cover cases that are settled and it does not cover the reported cases which might have been remanded for jury trial.

The fate of the 22 reported decisions in a single year gives you a very good overview, however, of how these cases go. I would like to point out three things. First, there are terrific barriers to even getting a case to trial. In every employment case I have ever handled, the defendant brings a motion for

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summary judgment, whether they are entitled to it or not. More often than not, judges are able to see that there are indeed issues of fact which have to be tried; what the judges are reluctant to see is that these motions are often times frivolous, in the sense that no reasonable attorney could fail to recognize the disputed issues of fact and the lack of merit to a motion to dismiss. It is our experience that defense attorneys milk their files and charge corporations for these summary judgment motions, and the corporations have no way of knowing they are getting a worthless product. Nevertheless, because of hostility to employment and civil right cases, because of docket pressures, or for whatever reasons, once in a while these motions will be granted. As you see, more often than not, they are wrongly granted and they have to be sent back by the Court of Appeals. Meanwhile, the plaintiff and the plaintiff's attorney, with relative lack of resources, have experienced expense and delay that cannot be recouped.

At trial our experience is that jury verdicts on the average are very modest in these cases. A substantial award for emotional damages is actually very rare. The feeling seems to be that if the economic damages are adequately compensated, very little will be added on for emotional damages.

Third, if the verdict even begins to approach full compensation for the plaintiff's actual loss, it is sure to be appealed. This means two or three more years of delay, and of course the potential for reversal and effective dismissal by the appellate court or remand for a re-trial.

Meanwhile you find that corporate defense firms are paid huge sums to defend the employers in these cases, whether they are small businesses or large corporations. I have seen employers happily pay their teams of attorneys tens of thousands of dollars to defend them against a case where they would not pay a wrongfully discharged employee or someone who was the victim of employment discrimination $20,000.00 to settle the case. If there are limitations on the damages available to plaintiffs, this situation will become worse. The corporations have money and they would rather spend it defending themselves and insulating themselves from liability than paying the most modest sums to wronged employees. To restrict damages available to plaintiffs in these cases will effectively immunize the employers from responsibility for discrimination.

Mr. Reggie Jovan
February 27, 1991
Page 3

There is one thing I would caution you about with respect to whatever material you are going to hear from the defense representative at the hearing. I surveyed a Michigan trial reporter last night to try to get a feel for trial results. I quickly realized that the trial reporter which is to some extent a volunteer reporting service, and depends on people calling up to report their cases, is reporting plaintiffs' verdicts in unrepresentative numbers. Also, they do not reflect the havoc that is done by trial court remittitur and reduction of verdicts and Court of Appeals decisions adverse to the plaintiff. The only reliable survey of employment cases in Michigan would be the final disposition of all cases when the appeals are all over. This would give you a picture of very small, average recoveries, won with much struggle.

I hope this has been of help.

Very truly yours,

Janet Tooley

Janet M. Tooley

JMT:kss

Progressive
POLICY INSTITUTE

February 18, 1991

Dear Friend:

House Democrats have reintroduced civil rights legislation vetoed last year by President Bush, setting the stage for another fractious debate over quotas and racial discrimination. In a tactical shift, Democrats are stressing the bill's benefits for women, while the Administration seeks to refocus the debate on new economic strategies for "empowering" racial minorities.

In *Ending the Deadlock: A Progressive Solution to the Civil Rights Stalemate*, the **Progressive Policy Institute** (PPI) examines the obstacles to a compromise on the Act, which is intended to reverse six 1989 Supreme Court decisions that trimmed safeguards against job discrimination. The PPI Backgrounder also offers four recommendations for resolving the sticking points in ways that restore protections against job bias without promoting quotas.

A close look at the controversy reveals that the rhetorical posturing against racism and reverse discrimination has obscured the narrow and technical nature of the dispute between the bill's liberal advocates and conservative critics. Given the broad agreement that exists on fundamental issues, a prolonged debate over the Civil Rights Act of 1991 is unnecessary as well as a distraction from more pressing claims on policy makers' attention.

The Backgrounder concludes that if partisans in both camps forgo the politics of racial polarization, Congress and the President can swiftly reach an agreement that protects women and minorities as well as law-abiding employers. The sooner that is done, the sooner the nation's political leadership can turn its attention to more urgent social dilemmas: pandemic crime and drug abuse, family breakdown, unemployment and undereducation, and the stubborn persistence of an isolated underclass.

PPI believes the larger challenge facing progressives today is to shift the focus of the equal opportunity debate from litigation and race-specific programs to new economic and social initiatives -- such as youth apprenticeship and voluntary national service -- that stimulate broad upward mobility.

Cordially,

Will Marshall

Will Marshall
President

316 Pennsylvania Avenue SE, Suite 555, Washington, D.C. 20003 202/547-0001 Fax 202/547-0099

Progressive
POLICY INSTITUTE

PPI BACKGROUNDER
February 18, 1991

ENDING THE DEADLOCK:
A Progressive Solution to the Civil Rights Stalemate

by Will Marshall and Bert Brandenburg

I. INTRODUCTION

As President Bush and Congressional Democrats prepare to rerun last year's debate on civil rights legislation, the key question is whether partisans in both camps want to pass a bill or to create a campaign issue. At stake are safeguards against job discrimination that the Supreme Court weakened in six 1989 rulings. Despite the hyperbolic rhetoric surrounding the bill, the points in dispute are narrow and can easily be resolved, provided that ideologues on both sides are willing to forsake the politics of racial polarization.

Conservatives continue to raise the specter of racial quotas, bolstered by the apparently successful use of that issue by Republicans in key 1990 races in North Carolina and California. Encouraged by civil rights groups and the Administration's fumbling of the minority scholarships issue, House Democrats have introduced a new version of the bill that retreats from compromises struck during last year's negotiations with the White House -- and that seems just as likely to invite another presidential veto.[1] However, by refocusing the debate on fairness to women, House sponsors of the Civil Rights Act of 1991 hope to win enough votes to override a veto.

This Progressive Policy Institute (PPI) Backgrounder examines the issues in dispute and offers recommendations for resolving the deadlock. The sooner the nation's political leadership can reach an accord on the Civil Rights Act, the sooner it can turn its attention to more urgent social dilemmas: pandemic crime and drug abuse, teenage pregnancy and family breakdown, unemployment and poor education, and the isolation of the underclass.

The solutions to these problems are unlikely to be found in a court room. Instead, progressives should refocus the fight for social justice on the economic and cultural fronts, especially on innovative approaches that empower poor and minority citizens to make the choices and control the resources necessary to liberate themselves from poverty and dependence.

And, as University of Chicago sociologist William J. Wilson has argued, such approaches should be universal rather than race-specific, so that public policy does not create a zero-sum game in which the gains of one group appear to come at the expense of another. Affirmative action ought to be rechanneled toward initiatives that help all Americans build the capacities they need to enter the social and economic mainstream. For example, a youth apprenticeship partnership

The Progressive Policy Institute 316 Pennsylvania Avenue, SE, Suite 555, Washington, D.C. 20003 202/547-0001

between public schools and local businesses will address the needs of racial and ethnic minorities within the broader context of an upward mobility program for all non-college-bound youth in our society.

II. BACKGROUND

While agreeing in principle to the need for corrective legislation, the President vetoed the civil rights bill last October on the grounds that it would force employers to adopt quotas in order to preempt job discrimination lawsuits.[2] Yet compromise language hammered out last year between Senate Democrats and eleven of their Republican colleagues would have largely restored the legal *status quo* that existed for nearly two decades before the Supreme Court rulings, with no evidence of hiring quotas.

If, as we believe, the charge of quotas is unfounded, it is also true that the bill's proponents have exaggerated the issues at stake. Stripped of overwrought claims about "reverse discrimination" or "turning back the clock on civil rights," the dispute turns mainly on semantics and procedural issues relating to the numbingly complex field of disparate impact litigation. Although the bill's backers have tried to evoke the moral urgency of the great civil rights battles of the 1960s, it is difficult to engage public emotions in a debate that centers on legal tactics rather than matters of high principle.

The President's election-eve veto notwithstanding, Congress and the White House came very close last year to agreement on the bill, which restores what both sides regard as important safeguards against discrimination that were taken away by the Supreme Court.[3] Given this common ground, Congress and the President can and should move swiftly to enact a bipartisan bill that protects women and minorities from job discrimination without promoting quotas.

This outcome can be achieved if both sides resist the temptation to indulge in racial politics. There may indeed be short-term political advantages to the Republican strategy of crying "quota" to drive a wedge between working class whites and blacks, and to the Democratic strategy of depicting Republicans as hostile to black aspirations, if not racist. But over the long run, such strategies will only retard our society's progress toward racial reconciliation and real equality of opportunity.

In a tactical shift, some advocates of the bill now argue that women will be its chief beneficiaries. Noting that the bill would allow women to sue for the same damages previously available only to racial minorities in intentional discrimination cases, House Judiciary Chairman Jack Brooks (D-TX) described the issue as "rights for white women."[4] However, this ploy may backfire, especially since the House bill failed to limit damage awards. Said one industry lobbyist, "The one issue the business community can rally around is damages."[5]

More fundamentally, the change in tactics seems to rest on the false -- and insulting – premise that the public will not support reasonable safeguards against job bias if the victims happen to be black. Nor will emphasizing gender necessarily immunize the bill's supporters against the quota charge.

Also maneuvering for tactical advantage is the White House, which reportedly is planning to add several "empowerment" initiatives such as educational choice and tenant-owned public housing to its alternative civil rights bill, which was rejected by almost two-thirds of Congress last year.[6] Yet the President is not likely to build broad support behind such alternatives to traditional anti-poverty programs if he again vetoes civil rights legislation. A credible strategy of empowerment must go hand-in-hand with strong legal protections against discrimination.

In the following sections, we examine the substantive obstacles to an agreement on the Civil Rights Act and propose fairly minor compromises intended to protect both victims of job discrimination and law-abiding employers.

III. STICKING POINTS

The argument between the President, conservatives and their business allies on one side and liberals and civil rights groups on the other boils down to four main sticking points:

> (1) **Damage Awards for Women:** Should compensatory and punitive damage awards be available to women who suffer intentional discrimination? Should such damages be awarded by judges or juries, and should they be capped? The Act would allow juries to award to women the same compensatory damages now available to racial minorities.[7] A group of Senate Republicans agreed last year, but only if such damages are awarded by judges rather than juries and are capped, lest a "lawyer's bonanza" of speculative lawsuits ensue. However, last month's House bill dropped the agreed-on $150,000 cap.
>
> (2) **Justifying Hiring and Promotion Decisions:** Should Congress reverse a Supreme Court decision relaxing the standard employers must meet in order to justify personnel procedures that disproportionately screen out minorities? While the Court and the Administration would allow employers to base their decisions on general business objectives, the Civil Rights Act would apply a stricter standard, requiring that such decisions bear "a significant relationship" to an applicant's ability to perform a specific job. Consider a company that requires that all employees have a high school diploma. In justifying that policy, should an employer be able to cite the company's general needs, or should the employer be required to show how the job in question requires a high school education?
>
> (3) **Challenging Groups of Personnel Policies:** Should Congress reverse a Supreme Court decision barring plaintiffs from challenging groups of hiring policies without showing how each policy by itself created a discriminatory result? The Civil Rights Act would restore group challenges,

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on the grounds that employment decisions are usually based on a combination of factors. Siding with the Court, the Administration argues that employers, faced with the prospect of defending virtually every employment decision they make, will instead hire by quota to avoid expensive and protracted litigation.[8] For example, suppose an employer requires a diploma, an entrance exam, a series of interviews, and prefers married applicants. If the plaintiff is unable to isolate the effect of each policy, but complains that they act in combination to screen out minorities, should the suit go forward?

(4) Challenging Court Settlements: Should Congress reverse a Supreme Court decision allowing third parties to challenge out-of-court settlements which set minority hiring and promotion goals? In order to encourage such settlements, the Civil Rights Act would block challenges by people who were not party to them, but who later claimed that the resulting employment goals kept them from getting a job or promotion. The Administration argues that the bill would deny legal redress to victims of reverse discrimination. The Court's decision stemmed from a suit by blacks alleging employment discrimination by the Birmingham, Alabama fire department. The resulting settlement set hiring and promotion goals for black applicants. Should a white who played no part in the settlement be permitted to challenge it years later on the grounds that it illegally denied him a job?

Another major dispute, over who should bear the burden of proof in disparate impact cases, apparently has been resolved. The Supreme Court ruled that, rather than forcing employers to defend their employment practices, courts should require plaintiffs to show why such practices are not justified. The Administration agreed with Congress that the burden should be shifted back to employers,[9] thus acknowledging that job bias against minorities remains the fundamental problem. The Act will help ensure that employers who persistently fail to hire qualified minorities or women will have to answer for it.

IV. STRIKING A COMPROMISE

The Progressive Policy Institute recommends the following four steps to ensure strong protections against job bias for women and minorities, without intimidating employers into adopting hiring and promotion quotas.

Recommendation One: *Let judges rather than juries award compensatory and punitive damages to victims of intentional discrimination, including women, and limit punitive damages to $150,000 or the total compensatory damages awarded, whichever is higher.*

Under current civil rights law, blacks victimized by intentional discrimination can seek compensatory and punitive damages. The Civil Rights Act of 1991 would extend the same ability to women and religious minorities, whose only redress in cases of intentional bias now are cease and desist orders and the recovery of back pay and attorney's fees.

The Act would permit women to seek compensatory damages for intentional bias, and to seek punitive damages in instances when employers acted "with malice, or with reckless and callous indifference" to their civil rights. The Act would also permit jury trials in such cases. Business groups have argued that the Act would disrupt the 1964 law's clear intent to encourage workers and employers to settle bias claims out of court.

Democrats agreed to cap punitive damage awards at $150,000 or at the total amount of compensatory damages awarded, whichever is higher. But in a significant step backwards, last month's House bill lifted the cap. The cap should be restored in order to assuage employers' fears of being hit by a rash of suits by lawyers and plaintiffs prospecting for big damage awards.

A modest cap is a small price to pay for equalizing access to damage awards in cases of intentional discrimination. Fair-minded employers have little to fear: Punitive damages would be available only to women who prove egregious employer discrimination, and appeals courts often reduce excessive awards. Similarly, the cap is unlikely to deny appropriate damages to deserving victims, for in practice punitive awards to racial minorities have rarely topped $150,000."[10]

Finally, the House bill would allow juries to set damage awards. The Bush Administration opposes such a change in the 1964 Civil Rights Act, which reserved this power to judges. The Administration has the better argument; civil rights activists have not shown that the twenty-five year old *status quo* denied just compensation to victims of discrimination.

Understanding Disparate Impact Suits

To understand the next two issues in dispute, it is necessary to grasp the rudiments of "disparate impact" litigation, a little-known method of enforcing the 1964 Civil Rights Act. First enunciated by the Supreme Court two decades ago, disparate impact litigation is a tool for challenging business practices that are "fair in form, but discriminatory in operation." The mere lack of discriminatory intent, wrote Justice Warren Burger for a unanimous Court, "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability....any tests must measure the person for the job and not the person in the abstract."[11]

A disparate impact suit has two critical stages. First, the plaintiff must establish the disparate impact of a firm's hiring practices -- a significant statistical difference between the minority composition of the employer's workforce and that of the qualified available labor pool. Second, the employer must demonstrate the "business necessity" of the practices alleged to have caused the disparate impact. In one instance, a police force height requirement which disproportionately excluded qualified Asians, but was not necessary for identifying good officers, was eliminated under the pressure of a disparate impact suit.[12]

Recommendation Two: *Establish flexible legislative guidelines for judges to use in deciding disparate impact suits. Rather than set up a single "one-size-fits-all" test for employers' hiring and promotion decisions, the Act should provide judges with a range of common sense standards that they can apply to fit the unique circumstances of each case.*

At issue is the standard employers must meet in order to justify employment practices that have an adverse effect on minorities.[13] Before the Supreme Court's 1989 *Wards Cove v. Atonio* decision,[14] courts across the country chose from a range of standards.[15] The Supreme Court chose one of the most permissive of those standards: personnel policies are justified if they "significantly serve legitimate employment goals of safety and efficiency."[16] Claiming that such a general standard would "seriously undermine" federal anti-discrimination laws, the sponsors of the Civil Rights Act would instead require that personnel decisions "bear a significant relationship to successful performance of the job."[17]

Although many courts have used similar standards for nearly two decades without prompting hiring quotas, conservatives claim that the Act's language will now have that result.[18] Yet it hardly seems likely that a federal judiciary stocked over the last decade with Reagan-Bush appointees, including America's most conservative Supreme Court in a generation, would interpret the law in ways that lead employers to adopt quotas as a defensive measure.

Nonetheless, to resolve this impasse Congress should set flexible guidelines that allow judges to take into account the requirements of the individual job (favored by liberals) and those of the business in general (preferred by conservatives), depending on the facts of each case.[19]

For example, Congress could require judges to give closer scrutiny to height and strength requirements that exclude women from jobs; to intelligence tests that are notoriously unreliable in determining an applicant's fitness for work; and to hiring criteria for jobs that require low or generally available skills, such as driving a truck, washing dishes or answering phones. Conversely, courts should show more deference to employer decisions that serve overriding business and public needs: ensuring the health and safety of workers and customers, as well as the success of the enterprise.[20] Examples might include a policy barring people with drug records from work as air traffic controllers, or a company's decision to close a plant in order to survive.

Recommendation Three: *Allow challenges to groups of personnel practices if plaintiffs can demonstrate a plausible link between those practices and the paucity of minorities and women in the defendant's workforce.*

This dispute involves the first stage of disparate impact suits, in which plaintiffs must establish a racial or gender disparity and point to the reasons for it. Before *Wards Cove*, some courts allowed plaintiffs to challenge groups of practices that allegedly combined to cause discrimination. But the Supreme Court held that plaintiffs must demonstrate how each challenged practice by itself has a "significantly disparate impact" on minority employment opportunities.[21]

The Civil Rights Act would reverse the *Wards Cove* ruling. Its proponents argue that employers often base their personnel decisions on many factors, leaving minorities and women guessing as to which are responsible for the disparate impact. Although the Bush Administration argued in favor of group challenges in its amicus curiae brief in the *Wards Cove* case, it contends that the Civil Rights Act puts no limit on the number of practices on which an employer can be challenged.[22]

Although conservatives have failed to prove that group practices suits led to quotas in the past, it is reasonable to require plaintiffs to show a plausible connection between each of the practices challenged and the discriminatory result. For example, even without proof, it is plausible that a 6' height requirement would disproportionately exclude many women and Asians. Without such an initial test of plausibility, employers potentially could be forced to defend every employment decision they make.

The Civil Rights Act also addresses a related question: If an employer lacks records showing that a group of business practices cause a disparity, should plaintiffs be thrown out of court for lack of evidence?[23] The Supreme Court said yes. The Act, however, says that if employer records are inadequate, plaintiffs need only show disparate results in order to proceed with the case.[24] Conservatives complain that employers without voluminous records would be forced to hire by quota in order to avoid "lawsuits by numbers."

We believe the Act's supporters have the stronger case: inadequate record-keeping should not shield employers from disparate impact suits.

Recommendation Four: *Every five years, review affirmative action settlements and permit challenges to them from people claiming reverse discrimination.*

Job bias cases are often settled out of court when employers agree to establish voluntary minority hiring guidelines. In its 1989 *Martin v. Wilks* decision,[25] the Supreme Court allowed third parties who believe those guidelines damage their job or promotion prospects to bring "reverse discrimination" suits challenging settlements at any time.[26]

Civil rights advocates charged that the Court's ruling would discourage settlements and ensure endless litigation. Unless the parties to a suit could identify in advance anyone who might ever be adversely affected by voluntary guidelines, no settlement would be safe from a legal challenge. Indeed, within months of the Supreme Court's decision, long-standing court decrees in job discrimination cases were challenged in over a dozen cities.[27]

The Act would bar most third parties from challenging consent decrees after they have been approved by the courts.[illegible] Because settlements are usually preferable to protracted litigation, some protection of consent decrees is necessary. There is also a precedent in bankruptcy and probate law for protecting settlement decrees from third parties.

However, settlements should be subject to periodic review after a certain interval, say five years, to ensure that the voluntary guidelines are still necessary and have not hardened into rigid quotas that discriminate against people who were not party to the original suit.[illegible]

Other Outstanding Issues

The Bush Administration has voiced lesser objections to other provisions of the bill -- its guidelines for attorney's fees, its statute of limitations for filing discrimination suits, and its application to previous cases. While none of these issues are trivial, they can easily be settled once agreement is reached on the more basic disputes discussed above.

V. BEYOND LITIGATION

As the foregoing discussion shows, nothing very fundamental remains at stake in the debate over the Civil Rights Act. Liberals want to tilt the rules of civil rights litigation slightly in favor of minority plaintiffs; conservatives want those rules to lean more toward the interests of employers. Despite the strident rhetoric of partisans on both sides, the real choice is not between quotas and racism. The real choice -- a test, actually, of both sides' sincerity -- is between passing a modest but necessary civil rights bill or creating a divisive campaign issue. PPI believes that, given a modicum of good faith on both sides, a compromise can be reached.

The larger challenge for progressives, however, is to shift the focus of the equal opportunity debate from litigation and race-specific programs to broad economic empowerment. Decades of economic progress are stalling out, health indicators are sagging, education costs are rising, race relations are deteriorating and inner-city drug abuse and drug related crime are epidemic -- and the victims are disproportionately minorities. These are challenges that no amount of judicial tinkering will cure.

Progressives are creating new and broad paths to upward mobility: a voluntary national service corps that offer all young people a chance to earn college scholarships by serving their communities; a youth apprenticeship system that would encourage non-college youth to stay in school and combine classroom learning with on-the-job training at local businesses; a guaranteed working wage that would ensure that no American family with a full-time worker will have to live in poverty; and, Individual Development Accounts to encourage low-income citizens to save and build assets.[illegible]

Such approaches make the quest for racial justice part of a broader strategy for developing the personal capacities of all Americans. They represent the next stage in America's unending struggle to redeem the promise of equal opportunity for all citizens.

NOTES

1. While House Democrats are backing away from compromise in order to hoard bargaining chips, we believe that Senate Democrats, by working at this writing to narrow their differences with the Administration, are more likely to avoid replaying last year's debacle.

2. Similarly, the new House bill has been characterized by the Administration as an "engine of litigation." Joan Biskupic, "New Struggle over Civil Rights Brings Shift in Strategy," *Congressional Quarterly*, Feb. 9, 1991, p. 366.

3. For example, the Court's decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), took away federal anti-discrimination protections from employees of businesses numbering 15 or fewer, a full 15% of the work force.

4. *Congressional Quarterly, op. cit.*, p. 367.

5. *Ibid.*, p. 368.

6. *The White House Bulletin*, Thursday, February 7, 1991.

7. Religious minorities would also be eligible for compensatory and punitive damages.

8. There is a second controversy: If an employer lacks records showing that a group of business practices cause a disparity, should plaintiffs be thrown out of court for lack of evidence? The Supreme Court said yes. The Act, however, says that if employer records are inadequate, plaintiffs need only show disparate results in order to proceed with the case. Conservatives protest that employers without voluminous records would be forced to hire by quota in order to avoid "lawsuits by numbers."

9. "Bush Vetoes Rights Bill, Objects to 'Quotas,'" *Congressional Quarterly*, October 27, 1990, p. 3684.

10. National Women's Law Center, *Analysis of Damage Awards Under Section 1981* (Washington, D.C., 1990).

11. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

12. *Civil Rights Act of 1990: Hearings on S.2104 Before the Senate Comm. on Labor and Human Resources*, [hereinafter *Civil Rights Hearings*] 101st Cong., 1st Sess. 245-47 (1989) (statement of Robert Lum, New York City Police Department).

13. For example, how important should a police department's 5'7" height requirement have to be to justify rejecting otherwise qualified Asians who are disproportionately shorter?

14. 109 S.Ct. 2115 (1989).

15. Some courts emphasized the business practice's relevance to the job at issue (making the standard harder to meet), while others – including the Supreme Court in *Wards Cove* – referred instead to the general needs of the business (a less stringent test).

16. Justice White speculated that a tougher standard "would be almost impossible for most employers to meet and would result in a host of evils....the only practicable option for many employers will be to adopt racial quotas."

17. In other situations (e.g., a plant closing or declaration of bankruptcy), management decisions would have to "bear a significant relationship to a manifest business objective of the employer."

18. "Bush Vetoes Rights Bill, Objects to 'Quotas,'" *Congressional Quarterly*, October 27, 1990, p. 3654.

19. A proposal suggested by Rep. John LaFalce (D-NY) offers a choice of tests, but gives no criteria for choosing between them. In addition, it leaves the choice to the employer, who will always pick the easiest standard to meet. A last-minute Bush proposal echoed the LaFalce approach.

20. Job requirements that screen out applicants on the basis of easily correctable characteristics – such as reasonable grooming and dress code requirements – might also merit greater deference to the employer's needs.

21. Otherwise, warned Justice White, plaintiffs could hold employers liable for a "myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."

22. See Brief for the United States, No. 87-1387, p. 22, quoted in *Wards Cove*, 109 S.Ct. at 2132 n.19 (Stevens, J., dissenting). The group practices approach is also consistent with relevant Equal Employment Opportunity Commission guidelines. 29 C.F.R. Section 1607.16 (Q).

23. For example, if an employer required applicants to be at least 5'7" tall and weigh at least 160 pounds but didn't keep records as to which criteria it used to reject applicants, rejected candidates would have no way of "proving" that either specific practice had a disparate impact.

24. But if sufficient employer records are available, plaintiffs must "demonstrate which specific practice or practices are responsible."

25. 109 S.Ct. 2180 (1989).

26. The only outsiders that can be bound by a consent decree, ruled the Court in *Martin v. Wilks*, are those whom the parties seek out and bring into the suit.

27. Lawyers Committee on Civil Rights, "Impact of the Supreme Court Decision in *Martin v. Wilks*," reprinted in *Civil Rights Hearings*, *op. cit.*, pp. 711-33.

28. Third parties could not contest settlements if (1) the parties make a "reasonable effort" to notify third parties of the pending settlement; (2) the third party knew of the suit but sat on the sidelines; or (3) the third party's interests were effectively represented by another third party who contested the pending settlement on time.

29. In addition, steps can be taken to insure that third parties and their interests are better represented at the time of the settlement:

(1) *Before the court approves a consent decree, the parties should be required to make significant efforts to notify outsiders of the decree's potential impact.* Notice should appear in newspapers, at factories, educational and vocational centers, union halls, unemployment offices, the local chamber of commerce, employment agencies and other venues that could reach outsiders whose interests might be hurt by a consent decree.

(2) *Before approving a consent decree, courts should be required to admit outsiders to a "fairness" hearing to inspect the decree for unconstitutional racial quotas.* If no outsider were available to contest the decree's constitutionality, a surrogate would be appointed by the court.

30. The following Progressive Policy Institute reports detail these strategies: Will Marshall and Joel Berg, "National Service and Student Aid: Myth and Reality," 1989; Robert I. Lerman and Hillard Pouncy, "Why America Should Develop a Youth Apprenticeship System," (Policy Report No. 5, 1990); Robert J. Shapiro, "An American Working Wage: Ending Poverty in Working Families," (Policy Report No. 3, 1990); and Michael Sherraden, "Stakeholding: A New Direction in Social Policy," (Policy Report No. 2, 1990).

The Progressive Policy Institute is a project of the Democratic Leadership Council.

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Statement
by
The Associated General Contractors of America
on
H.R. 1, The "Civil Rights Act of 1991"
Delivered to
The Committee on Education and Labor
of
United States House of Representatives
March 5, 1991

The Associated General Contractors of America (AGC) is a national trade association of more than 32,500 firms, including 8,000 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing development.

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AGC welcomes and appreciates the opportunity to present its views on H.R. 1. AGC strongly opposes this bill for the following reasons:

- the bill would compel employers to resort to quotas, based on race, color, religion, sex and national origin;
- the bill would generate endless litigation, at the expense of conciliation, and to the primary benefit of the nation's trial lawyers;
- the bill disregards the well-founded view that "make whole" relief is the appropriate redress for workplace violations of the modern labor and employment laws, and would create great pressure for later amendments to at least fifteen other federal statutes that do not now provide for the award of compensatory or punitive damages;
- the bill would establish a double standard for civil rights litigation, stripping the courts of their jurisdiction over a broad category of claims that non-minorities are most likely to assert; and
- the bill would impose liability on employers for merely thinking in terms of race, color, religion, sex and/or national origin -- even where those thoughts had no employment consequence.

AGC continues to strongly support the original inspirational goals and objectives of the civil rights movement, which held out the promise of equal treatment for all individuals, without regard to race, color, religion, sex or national origin. That promise was a powerful one that swept across the entire nation, forging a new national consensus that all men and women have the civil right to be free of arbitrary and invidious discrimination.

H.R. 1 would betray that promise, as surely and forcefully as the defeated "Civil Rights Act of 1990." H.R. 1 ignores the truth that individual discrimination remains a matter of national concern. The bill implies that such discrimination can be safely condoned, in the name of statistical "parity." It is now safe, we are told, to subordinate each individual's unique characteristics to the deadening prejudgments of race, color, religion, sex and national origin -- so long as the result is a "proportional" workforce, acceptable to those interests whose views, if legislated, would result in a permanently divided society.

Using the nation's higher ideals to justify employment quotas would quickly and completely undermine and erode public support for those ideals and retard full equal opportunity.

As demonstrated by the defeat of the "Civil Rights Act of 1990," the nation remains committed to those higher ideals, and will not allow them to be used to advance an agenda of divisiveness and unequal special preferences. In the name of civil rights, that bill demanded an exorbitant "tax" on all employers who might actually dare to treat each applicant and each employee as a truly unique individual. It was not a "tax" in the literal sense of that word, but it was an equally severe financial penalty, in the form of attorneys fees and other litigation expenses -- to be calculated, collected and kept by trial lawyers.

No, the defeated bill did not expressly require quotas. It even protested that it should not "be construed" to require quotas. At the same time, however, the bill imposed an enormous risk of litigation and its related expenses on any employer who permitted the percentage of minorities or women in a particular job group to stray too far from the percentage that could serve as the starting point for a future claim of "disparate impact."

H.R. 1 also compels employers to resort to quotas. In often identical language as that contained in last year's rejected legislation, H.R. 1 imposes the same enormous risk of litigation on any employer who _fails_ to count by race, color, religion, sex _and_ national origin. As did the earlier bill, H.R. 1 would make three dramatic changes in "disparate impact" litigation:

- it would authorize a legal challenge to a broad "group of employment practices" based on bottom line results that remained _no defense_ to a charge of discrimination;
- it would require the employer (1) to show that one or more of the practices did _not_ contribute to the alleged disparity from the "right" percentage, _and_ (2) to prove that the remainder of the practices were a matter of "business necessity"; and
- it would define "business necessity" in exceptionally narrow terms that expressly required the employer to absorb the huge additional expense of producing "statistical reports, validation studies, expert testimony" and other "demonstrable evidence."

The "group of employment practices" might be so broad as to leave an employer liable for a labor union's intentional discrimination in making referrals out of a hiring hall. No matter how crafted, a hiring hall provision in a collective bargaining agreement will have a "disparate impact" if the union engages in such discrimination. Nowhere does H.R. 1 recognize that an employer may have no means to stop it. Compare General Building Contractors Association v. Pennsylvania, 458 U.S. 375 (1982).

At the same time, the definition of "business necessity" would be so narrow that only an express exception to the general rules of "disparate impact" litigation would save necessary policies against the employment of current drug users. Broad policies against the employment of careless individuals who disobeyed safety rules would be among many other legitimate policies that could withstand "disparate impact" litigation only if proven, by "demonstrable evidence," to "bear a significant relationship to successful job performance."

In an effort to ensure that the compelled quotas would be carefully hidden from public view, and/or to ensure an endless cycle of litigation, H.R. 1 would also authorize jury trials, and the award of compensatory and punitive damages, in "disparate treatment" cases that involve intentional discrimination. The bill asserts that jury trials and related claims for damages would be limited to these "disparate treatment" cases. The same set of facts are, however, often alleged to justify legal claims for both "disparate treatment" and "disparate impact." And such "claims" are all that the bill requires for a jury trial. An employer might still prevail on the question of intentional discrimination, and avoid compensatory and punitive damages, but it could not avoid the very real possibility that a jury would base its decision more on its empathy with another wage earner than on the objective facts of the case.

In addition, the bill expressly denies compensatory and punitive damages only to those who file suit under the new section on "disparate impact," to be known as

Section 703(k). The relevant portion of the bill makes no reference to Section 703(a)(2), which already provides a basis for claims of "disparate impact."

Even if limited to cases that raised bona fide and serious questions of intentional discrimination, the provisions on compensatory and punitive damages would work a radical departure from one of the most basic premises of modern labor and employment law. It has long been the American view that "make whole" relief -- including back pay, reinstatement, other "equitable" relief, and possibly liquidated damages -- is the appropriate redress for workplace violations of the modern labor and employment laws.

Make whole relief is more appropriate than compensatory or punitive damages because it encourages conciliation and settlement. The prospect of compensatory and punitive damages that have no bearing on any prior economic loss, and may well run into the millions of dollars, only fuels confrontation and lengthy litigation.

In clear recognition of this fact, the vast majority of the modern labor and employment laws do not provide for the award of compensatory or punitive damages. These laws date back to 1931, and include:

- the Davis-Bacon Act;
- the National Labor Relations Act;
- the Fair Labor Standards Act;
- the Equal Pay Act;
- Title VII of the Civil Rights Act;
- Executive Order 11246;
- the Service Contract Act;
- the Age Discrimination in Employment Act;
- the Occupational Safety and Health Act;
- the Rehabilitation Act;
- the Employee Retirement Income Security Act;

- the Vietnam Era Veterans' Readjustment Assistance Act;
- the Pregnancy Discrimination Act;
- the Immigration Reform and Control Act; and
- the Worker Adjustment and Retraining Notification Act.

The proponents of compensatory and punitive damages have been quick to cite the Civil Rights Act of 1866, as codified at 42 U.S.C. § 1981. That statute generally prohibits racial discrimination in the making and enforcement of contracts. And it does provide for compensatory and punitive damages. But it predates the many federal statutes that now provide for the comprehensive regulation of the American workplace. It predates the many federal agencies that now investigate, conciliate and seek to settle employment disputes. And it was enacted with little thought of its potential consequences for the private workplace. Section 1981 was long thought to apply only to actions taken by the government. It was more than one hundred years after the statute went into effect that the Supreme Court surprised the nation with the ruling that the statute also applies to decisions made by private employers. For these reasons, Section 1981 is not a sound precedent for the award of compensatory and punitive damages in modern labor and employment cases.

As already noted, H.R. 1 would impose an exorbitant "tax" on merit systems for the selection and promotion of employees. That "tax" would compel employers to resort to quotas, based on race, color, religion, sex and national origin. At the same time, however, the compensatory and punitive damages for intentional discrimination would oblige employers to keep quotas carefully hidden from public view, for quotas demand intentional discrimination. At one and the same time, H.R. 1 insists on quotas and on a denial that they exist!

H.R. 1 would spark an endless cycle of employment litigation as employers searched for a harbor safe from both "disparate impact" and "disparate treatment" litigation. In order to satisfy those who insist on workforce "parity," employers would have to risk dramatically increased liability for intentional discrimination. In order to avoid compensatory and punitive damages, employers would have to keep their quotas hidden. The result would be endless suspicion, and endless litigation, as attorneys launched their discovery into every facet of every employers' operations. The first round of litigation would cause a second, and the second a third, and the third a fourth, and on and on and on.

AGC opposes H.R. 1 for all of these reasons and for several others. It is wrong and probably unconstitutional to strip the federal courts of much of their jurisdiction to hear non-minorities' claims against court decrees that mandate preferential treatment for minorities. Applicants and employees who are not parties to such decrees should not be bound by their terms.

It is similarly wrong to hold an employer liable for compensatory and punitive damages, attorneys fees, and witness fees, even where the employer proves that he or she had entirely legitimate reasons for an employment decision, and would have made the same decision even in the absence of any improper consideration of race, color, religion, sex or national origin.

The dramatic changes in the current statute of limitations, the new language on expert fees, the ban on lump sum settlements that include attorneys fees, and the retroactivity of the statutory amendments -- all betray a far greater interest in civil rights litigation then in the national consensus that all Americans are entitled to succeed, and to fail, on their individual merits, and wholly without regard to race, color, religion, sex or national origin.

AGC urges Congress to reject H.R. 1 and any similar effort to make civil rights anything other than personal rights, "guaranteed to the individual." Shelly v. Kramer, 334 U.S. 1, 22 (1948).

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

March 26, 1991

Mr. Greg Watchman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Greg:

This is in response to your request for Title VII charge statistics for fiscal years 1986 through 1990.

Enclosed you will find statistics detailing three types of EEOC charge resolutions for fiscal years 1986 through 1990, including:

- o Withdrawals with Benefits
- o Negotiated Settlements
- o Successful Conciliations

It should be noted that your request excluded one of EEOC's four types of merit resolutions. EEOC includes unsuccessful conciliations as part of its merit resolutions since many of these charges are eventually litigated by EEOC.

Also enclosed are statistics on EEOC Title VII charge receipts by basis, including concurrent Title VII charges, for FY 1986 through FY 1990.

The data is based on information contained in EEOC's National Data Base and the figures may vary slightly from EEOC's actual inventory figures cited in other reports published by the agency. EEOC primarily utilizes its National Data Base reports as a management tool for data verification and analysis.

Please let me know if you have any questions.

Sincerely,

James G. Lafferty
Director of Communications
and Legislative Affairs

Enclosures

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Equal Employment Opportunity Commission

National Database
Charge Receipt Listing

CHARGE RECEIPTS 100185 - 093086: FY 1986 Title VII Receipts - EEOC
GRAND TOTAL

Total Records Selected : 67000
Chgs w/ Mult. Bas/Stats: 16382
Chgs w/ Multiple Issues: 26206

STATUTE/BASIS SUMMARY BY ISSUES

ISSUES	TITLE VII															
	RACE	RELIG	ORIGIN	RETAL	SEX	OTHER	TOTAL ISSUES	TOTAL CHGS	EPA	ADEA	OTHER STAT	TOTAL ISSUES	TOTAL CHGS	% VII CHGS	% CHGS	
A1 ADVERTISING	18	0	5	5	11	6	45	33	4	1	0	50	33	.0	.0	A1
A2 APPRENTICE	49	2	4	8	32	1	96	82	0	2	0	98	82	.1	.1	A2
B1 BENEFITS	604	36	124	218	721	96	1799	1448	66	144	0	2009	1448	2.2	2.2	B1
D1 DEMOTION	1245	35	215	306	880	130	2811	2281	77	250	0	3138	2281	3.4	3.4	D1
D2 DISCHARGE	20183	840	3951	3707	11555	1644	41880	35204	401	2050	0	44331	35204	52.5	52.5	D2
D3 DISCIPLINE	539	17	57	208	212	18	1051	795	7	45	0	1103	795	1.2	1.2	D3
E1 EXCLUSION	91	7	17	20	33	11	179	120	1	6	0	186	120	.2	.2	E1
H1 HARASSMENT	1134	69	244	493	696	88	2724	2058	25	161	0	2910	2058	3.1	3.1	H1
H2 HIRING	3246	157	626	421	1833	401	6684	5370	18	593	0	7295	5370	8.0	8.0	H2
I1 INTIMIDATION	2177	109	483	949	1191	144	5053	3854	57	238	0	5348	3854	5.8	5.8	I1
J1 JOB CLASS.	268	7	55	41	227	33	631	493	37	33	0	701	493	.7	.7	J1
L1 LAYOFF	1970	51	412	273	1193	156	4055	3486	55	358	0	4468	3486	5.2	5.2	L1
M1 MATERNITY	224	6	60	47	2711	28	3076	2771	15	6	0	3097	2771	4.1	4.1	M1
O1 OTHER	4269	243	771	1589	2470	751	10093	8100	143	519	0	10755	8100	12.1	12.1	O1
P1 PATERNITY	32	0	7	3	57	9	108	94	2	3	0	113	94	.1	.1	P1
P3 PROMOTION	2869	66	437	516	1291	206	5385	4262	87	332	0	5804	4262	6.4	6.4	P3
Q1 QUALIFICAT.	290	7	20	15	171	16	519	406	6	112	0	637	406	.6	.6	Q1
R1 RECALL	537	10	90	108	283	32	1060	919	6	83	0	1149	919	1.4	1.4	R1
R2 REF UNFAVOR	40	1	23	55	31	4	154	126	0	14	0	168	126	.2	.2	R2
R3 REFERRAL	165	4	18	56	70	13	326	259	1	12	0	339	259	.4	.4	R3
R4 REINSTATEMT	49	0	6	15	51	4	125	102	0	6	0	131	102	.2	.2	R4
R5 RETIRE UNVOL	44	5	16	8	44	31	148	126	3	71	0	222	126	.2	.2	R5
S1 SEGREG FAC.	38	0	7	3	16	1	65	65	2	2	0	69	65	.1	.1	S1
S2 SEGREG LOC.	14	0	5	3	7	4	33	25	0	0	0	33	25	.0	.0	S2
S3 SENIORITY	376	8	53	57	193	38	725	563	14	67	0	806	563	.8	.8	S3
S4 SEX HARASS	368	33	93	601	3241	93	4429	3372	58	70	0	4557	3372	5.0	5.0	S4
S5 SUSPENSION	506	19	76	166	158	36	961	780	2	33	0	996	780	1.1	1.1	S5
T1 TENURE	60	3	8	7	36	8	122	99	1	10	0	133	99	.1	.1	T1
T2 TERMS OF EMP	8869	416	1805	2480	4923	1254	19747	15094	299	1013	0	21059	15094	22.5	22.5	T2
T3 TESTING	32	1	1	3	7	1	45	39	0	3	0	48	39	.1	.1	T3
T4 TRAINING	624	21	97	118	323	49	1232	938	23	66	0	1321	938	1.4	1.4	T4
U1 UNION REP.	622	14	84	73	235	33	1061	898	5	47	0	1113	898	1.3	1.3	U1
W1 WAGES	4752	112	855	1027	3431	982	11159	8493	1078	666	0	12903	8493	12.7	12.7	W1
TOTAL BAS/STAT	56344	2299	10725	13559	38333	6321	127581	0	2493	7016	0	137090	0			
TOTAL CHARGES	37696	1501	7006	8187	22626	3836	0	67000	1168	4371	0	0	67000			
% TOTAL CHGS	56.3	2.2	10.5	12.2	33.8	5.7	.0	100.0	1.7	6.5	.0					

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TITLE VII CHARGES CLOSED
DURING FY 1990

03/19/91
13:22:34

CLOSURES	RACE	RELIGION	ORIGIN	RETAL	SEX	OTHER	BASIS TOTAL	CHARGE TOTAL	
WITHDRAWN WITH BENEFITS (W1)	1274	49	246	304	952	158	2983	2474	W1
NEGOTIATED SETTLEMENT (W2)	2308	80	360	460	1571	177	4956	4209	W2
SUCCESSFUL CONCILIATION (W4)	75	6	13	41	109	19	263	209	W4
TOTALS	3657	135	619	805	2632	354	8202	6892	

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03/22/91
02:02:54

Equal Employment Opportunity Commission

National Database
Charge Receipt Listing

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CHARGE RECEIPTS 100186 - 093087. FY 1987 Title VII Receipts - EEOC
GRAND TOTAL

Total Records Selected : 55050
Chgs w/ Mult. Bas/Stats: 14117
Chgs w/ Multiple Issues: 21570

STATUTE/BASIS SUMMARY BY ISSUES

ISSUES	TITLE VII RACE	RELIG	ORIGIN	RETAL	SEX	OTHER	TOTAL ISSUES	TOTAL CHGS	EPA	ADEA	OTHER STAT	TOTAL ISSUES	TOTAL CHGS	% VII CHGS	% CHGS	
A1 ADVERTISING	6	1	4	2	7	1	21	14	0	1	0	22	14	.0	0	A1
A2 APPRENTICE	29	2	3	7	18	1	58	41	0	1	0	59	41	.1	.1	A2
B1 BENEFITS	415	22	116	149	571	172	1445	1088	140	114	0	1699	1088	2.0	2.0	B1
D1 DEMOTION	1166	37	218	289	819	124	2653	2059	63	249	0	2965	2059	3.7	3.7	D1
D2 DISCHARGE	16790	647	3195	3716	9194	1117	34659	28823	399	1842	0	36900	28823	52.4	52.4	D2
D3 DISCIPLINE	1477	47	186	622	527	68	2927	2190	24	134	0	3085	2190	4.0	4.0	D3
E1 EXCLUSION	43	1	11	13	37	8	113	89	1	11	0	125	89	.2	.2	E1
H1 HARASSMENT	2637	182	895	1604	1674	211	7203	5325	75	404	0	7682	5325	9.7	9.7	H1
H2 HIRING	2635	107	534	456	1461	173	5366	4404	9	473	0	5848	4404	8.0	8.0	H2
I1 INTIMIDATION	959	62	305	540	635	86	2587	1857	26	152	0	2765	1857	3.4	3.4	I1
J1 JOB CLASS.	239	5	82	80	247	62	715	517	38	45	0	798	517	.9	.9	J1
L1 LAYOFF	1534	40	307	811	398	122	3212	2674	47	348	0	3607	2674	4.9	4.9	L1
M1 MATERNITY	198	8	34	49	1913	45	2247	1985	16	3	0	2266	1985	3.6	3.6	M1
O1 OTHER	2272	119	397	871	1328	436	5423	4291	89	350	0	5862	4291	7.8	7.8	O1
P1 PATERNITY	49	2	12	9	42	4	118	98	2	5	0	125	98	.2	.2	P1
P3 PROMOTION	1762	32	267	402	845	106	3413	2580	60	198	0	3671	2580	4.7	4.7	P3
Q1 QUALIFICAT.	82	2	28	17	54	7	190	148	6	15	0	211	148	.3	.3	Q1
R1 RECALL	375	14	89	68	178	32	756	636	4	86	0	846	636	1.2	1.2	R1
R2 REF UNFAVOR	95	1	23	159	36	15	329	269	1	17	0	347	269	.5	.5	R2
R3 REFERRAL	114	6	33	34	59	7	253	204	0	21	0	274	204	.4	.4	R3
R4 REINSTATEMT	125	3	28	44	86	14	300	250	2	14	0	316	250	.5	.5	R4
R5 RETIRE UNVOL	39	4	18	16	46	15	138	135	2	81	0	221	135	.2	.2	R5
S1 SEGREG FAC.	63	2	20	6	16	9	116	82	3	5	0	124	82	.1	.1	S1
S2 SEGREG LOC.	10	0	0	1	8	0	19	18	0	0	0	19	18	.0	.0	S2
S3 SENIORITY	211	4	33	41	125	17	431	348	8	73	0	512	348	.6	.6	S3
S4 SEX HARASS	303	25	67	682	2955	104	4136	3065	65	60	0	4261	3065	5.6	5.6	S4
S6 SUSPENSION	1119	43	200	454	428	53	2297	1791	11	86	0	2394	1791	3.3	3.3	S6
T1 TENURE	61	7	25	32	42	11	178	127	1	21	0	200	127	.2	.2	T1
T2 TERMS OF EMP	6001	256	1321	1966	3413	694	13651	10381	291	807	0	14749	10381	18.9	18.9	T2
T3 TESTING	84	0	18	7	39	1	149	124	0	3	0	152	124	.2	.2	T3
T4 TRAINING	538	7	95	104	276	51	1071	801	24	77	0	1172	801	1.5	1.5	T4
U1 UNION REP.	398	9	59	54	159	41	720	590	11	41	0	772	590	1.1	1.1	U1
W1 WAGES	4767	118	822	1088	3494	1491	11780	8497	1241	676	0	13697	8497	15.4	15.4	W1
TOTAL BAS/STAT	48885	1795	9192	13780	31632	5297	109674	0	2659	5411	0	117744	0			
TOTAL CHARGES	31102	1115	5836	7868	18330	2866	0	55050	1187	3925	0	0	55050			
% TOTAL CHGS	56.5	2.0	10.6	14.3	33.3	5.2	.0	100.0	2.2	7.1	.0					

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TITLE VII CHARGES CLOSED
DURING FY 1987

08/10/91
14:12:10

CLOSURES	RACE	RELIGION	ORIGIN	RETAL	SEX	OTHER	BASIS TOTAL	CHARGE TOTAL	
WITHDRAWN WITH BENEFITS (W1)	1880	72	316	545	1545	416	4774	3769	W1
NEGOTIATED SETTLEMENT (M2)	2765	102	340	681	2010	492	6390	5099	M2
SUCCESSFUL CONCILIATION (M4)	153	14	23	56	276	74	596	477	M4
TOTALS	4798	188	679	1282	3831	982	11760	9345	

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03/22/91
09:50:49

Equal Employment Opportunity Commission

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CHARGE RECEIPTS 100187 - 093088: FY 1988 Title VII Receipts - EEOC
GRAND TOTAL

Total Records Selected : 53605
Chgs w/ Mult. Bas/Stats: 14137
Chgs w/ Multiple Issues: 19889

STATUTE/BASIS SUMMARY BY ISSUES

ISSUES	TITLE VII RACE	RELIG	ORIGIN	RETAL	SEX	OTHER	TOTAL ISSUES	TOTAL CHGS	EPA	ADEA	OTHER STAT	TOTAL ISSUES	TOTAL CHGS	% VII CHGS	% CHGS	
A1 ADVERTISING	7	0	2	0	7	0	16	15	0	1	0	17	15	.0	.0	A1
A2 APPRENTICE	22	0	4	3	11	1	41	31	0	1	0	42	31	.1	.1	A2
B1 BENEFITS	625	21	286	140	437	128	1617	1176	53	105	0	1773	1176	2.2	2.2	B1
D1 DEMOTION	1186	36	222	324	777	100	2665	2101	74	237	0	2968	2101	3.9	3.9	D1
D2 DISCHARGE	15580	627	2941	3848	8800	793	32089	26867	368	1788	0	34245	26867	50.1	50.1	D2
D3 DISCIPLINE	1313	47	191	504	500	40	2595	2020	16	120	0	2731	2020	3.7	3.7	D3
E1 EXCLUSION	99	4	21	18	53	6	201	144	2	21	0	224	144	.3	.3	E1
H1 HARASSMENT	3117	208	756	1477	1973	207	7738	5787	96	462	0	8297	5787	10.7	10.7	H1
H2 HIRING	2983	175	606	428	1210	660	6061	4626	16	549	0	6626	4626	8.6	8.6	H2
I1 INTIMIDATION	785	47	214	413	468	51	1953	1405	24	131	0	2108	1405	2.6	2.6	I1
J1 JOB CLASS.	242	4	47	59	166	41	559	417	35	45	0	639	417	.8	.8	J1
L1 LAYOFF	1314	17	318	240	841	90	2818	2370	43	294	0	3155	2370	4.4	4.4	L1
M1 MATERNITY	190	1	32	37	1738	26	2024	1778	12	2	0	2038	1778	3.3	3.3	M1
O1 OTHER	1653	93	315	665	1077	386	4189	3326	128	256	0	4573	3326	6.2	6.2	O1
P1 PATERNITY	28	1	6	11	42	2	90	74	2	4	0	96	74	.1	.1	P1
P3 PROMOTION	2237	48	414	471	1037	135	4342	3341	79	330	0	4751	3341	6.2	6.2	P3
Q1 QUALIFICAT.	86	1	10	12	31	8	148	111	2	16	0	164	111	.2	.2	Q1
R1 RECALL	276	4	49	65	140	13	547	480	3	58	0	608	480	.9	.9	R1
R2 REF UNFAVOR	96	7	30	128	37	10	308	232	9	21	0	338	232	.4	.4	R2
R3 REFERRAL	134	6	19	37	44	6	245	202	1	22	0	268	202	.4	.4	R3
R4 REINSTATEMT	120	4	19	32	107	8	290	240	4	20	0	314	240	.4	.4	R4
R5 RETIRE INVOL	47	2	10	14	30	12	115	104	3	67	0	185	104	.2	.2	R5
S1 SEGREG FAC.	56	1	25	12	20	3	117	80	2	7	0	126	80	.1	.1	S1
S2 SEGREG LOC.	24	0	4	8	14	1	51	37	1	4	0	56	37	.1	.1	S2
S3 SENIORITY	196	0	18	27	139	66	446	333	58	29	0	533	333	.6	.6	S3
S4 SEX HARASS	280	22	78	705	2860	65	4077	2995	71	83	0	4231	2995	5.6	5.6	S4
S5 SUSPENSION	1206	37	191	409	411	36	2284	1823	15	89	0	2388	1823	3.4	3.4	S5
T1 TENURE	62	7	18	16	37	9	149	108	5	13	0	167	108	.2	.2	T1
T2 TERMS OF EMP	6637	230	1164	1725	2904	987	12867	9546	218	686	0	13801	9546	17.7	17.7	T2
T3 TESTING	646	1	11	11	15	586	1250	666	0	7	0	1257	666	1.2	1.2	T3
T4 TRAINING	577	11	140	116	267	50	1161	824	16	76	0	1253	824	1.5	1.5	T4
U1 UNION REP.	412	7	55	59	143	25	701	576	8	41	0	750	576	1.1	1.1	U1
W1 WAGES	4417	95	1006	959	2082	1219	10666	7711	1136	659	0	12463	7711	14.3	14.3	W1
TOTAL BAS/STAT	49841	1761	9229	12477	26382	5770	104460	0	2501	6342	0	113208	0			
TOTAL CHARGES	30947	1172	6057	7421	17830	2807	0	53605	1207	4074	0	0	53605			
% TOTAL CHGS	58.9	2.2	11.2	13.8	33.1	5.2	.0	100.0	2.2	7.6	.0					

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TITLE VII CHARGES CLOSED
DURING FY 1990

03/19/91
14:14:19

CLOSURES	RACE	RELIGION	ORIGIN	RETAL	SEX	OTHER	BASIS TOTAL	CHARGE TOTAL	
WITHDRAWN WITH BENEFITS (M1)	1829	72	330	550	1429	438	4648	3630	M1
NEGOTIATED SETTLEMENT (M2)	2448	88	351	686	1827	522	5922	4854	M2
SUCCESSFUL CONCILIATION (M4)	170	9	43	82	216	45	565	415	M4
TOTALS	4447	169	724	1318	3472	1005	11135	8899	

03/22/91
10:51:11

Equal Employment Opportunity Commission

National Database
Charge Receipt Listing

CHARGE RECEIPTS 100188 - 093089: FY 1989 Title VII Receipts - EEOC
GRAND TOTAL

Total Records Selected : 48895
Chgs w/ Mult. Bas/State: 12780
Chgs w/ Multiple Issues: 18102

STATUTE/BASIS SUMMARY BY ISSUES

ISSUES	TITLE VII RACE	RELIG	ORIGIN	RETAL	SEX	OTHER	TOTAL ISSUES	TOTAL CHGS	EPA	ADEA	OTHER STAT	TOTAL ISSUES	TOTAL CHGS	% VII CHGS	% CHGS	
A1 ADVERTISING	6	0	5	6	5	0	22	14	0	0	0	22	14	.0	.0	A1
A2 APPRENTICE	22	3	2	1	22	0	50	35	0	2	0	52	35	.1	.1	A2
B1 BENEFITS	617	15	167	149	457	136	1541	1134	92	76	0	1709	1134	2.3	2.3	B1
D1 DEMOTION	1017	29	236	285	693	75	2335	1848	51	206	0	2592	1843	3.8	3.8	D1
D2 DISCHARGE	14312	600	2954	3381	8367	602	30216	25201	407	1715	0	32338	25201	51.6	51.6	D2
D3 DISCIPLINE	1419	68	210	619	584	46	2948	2239	17	121	0	3086	2239	4.6	4.6	D3
E1 EXCLUSION	51	3	22	28	33	2	139	110	2	11	0	152	110	.2	.2	E1
H1 HARASSMENT	2885	196	793	1894	1714	128	7118	5308	69	411	0	7618	5308	10.9	10.9	H1
H2 HIRING	2211	142	637	858	1143	59	4550	3817	10	576	0	5136	3817	7.8	7.8	H2
I1 INTIMIDATION	788	60	219	416	485	52	2020	1482	30	112	0	2162	1482	3.0	3.0	I1
J1 JOB CLASS.	230	4	39	51	151	38	513	386	38	39	0	590	386	.8	.8	J1
L1 LAYOFF	1098	24	285	243	779	72	2479	2056	49	268	0	2796	2056	4.2	4.2	L1
M1 MATERNITY	189	1	25	38	1498	23	1754	1538	7	3	0	1764	1538	3.2	3.2	M1
O1 OTHER	1569	116	803	888	928	167	3749	2874	80	249	0	4078	2874	5.9	5.9	O1
P1 PATERNITY	20	0	2	5	21	1	49	39	1	1	0	51	39	.1	.1	P1
P3 PROMOTION	3844	73	477	586	1305	157	6442	4170	81	408	0	6931	4170	8.6	8.6	P3
Q1 QUALIFICAT.	75	1	20	14	45	10	165	118	4	23	0	192	118	.2	.2	Q1
R1 RECALL	206	3	31	41	110	4	395	344	1	47	0	443	344	.7	.7	R1
R2 REF. UNFAVOR	85	7	23	126	32	4	279	221	3	10	0	292	221	.5	.5	R2
R3 REFERRAL	84	12	20	20	46	4	204	165	0	19	0	223	165	.3	.3	R3
R4 REINSTATEMT	122	1	29	50	106	4	312	257	2	27	0	341	257	.5	.5	R4
R5 RETIRE UNVOL	17	2	6	9	30	3	67	66	1	48	0	116	66	.1	.1	R5
S1 SEGREG FAC.	68	2	3	8	44	32	154	83	32	2	0	188	83	.2	.2	S1
S2 SEGREG LOC.	7	0	0	2	9	0	18	18	0	0	0	18	18	.0	.0	S2
S3 SENIORITY	161	4	30	35	126	21	347	270	15	24	0	386	270	.6	.6	S3
S4 SEX HARASS	271	16	91	750	2900	79	4113	2992	59	77	0	4249	2992	6.1	6.1	S4
S5 SUSPENSION	1134	41	179	414	433	22	2223	1773	9	91	0	2323	1773	3.6	3.6	S5
T1 TENURE	62	2	25	21	27	3	140	108	2	13	0	155	108	.2	.2	T1
T2 TERMS OF EMP	4618	195	895	1587	2921	345	10161	7636	227	609	0	10997	7636	15.7	15.7	T2
T3 TESTING	65	1	9	10	19	3	107	91	1	4	0	112	91	.2	.2	T3
T4 TRAINING	[illegible]	14	101	120	262	62	1113	824	39	74	0	1226	824	1.7	1.7	T4
U1 UNION REP.	335	22	56	74	143	8	627	519	0	29	0	656	519	1.1	1.1	U1
W1 WAGES	3530	90	667	804	2512	1160	6772	6154	1110	492	0	10374	6154	12.6	12.6	W1
TOTAL BAS/STAT	40606	1747	[illegible]	12922	27559	3320	94122	0	2459	5785	0	102366	0			
TOTAL CHARGES	27313	1167	[illegible]	7240	16630	1604	0	48895	1127	3853	0	0	48895			
% TOTAL CHGS	55.9	2.4	11.7	14.9	34.0	3.8	.0	100.0	2.3	7.9	.0					

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TITLE VII CHARGES CLOSED
DURING FY 1990

09/10/91
12:28:52

CLOSURES	RACE	RELIGION	ORIGIN	RETAL	SEX	OTHER	BASIS TOTAL	CHARGE TOTAL	
WITHDRAWN WITH BENEFITS (M1)	1572	65	336	512	1227	373	4085	3158	M1
NEGOTIATED SETTLEMENT (M2)	2448	110	408	704	1748	465	5883	4597	M2
SUCCESSFUL CONCILIATION (M4)	153	17	42	62	189	46	509	384	M4
TOTALS	4173	192	786	1278	3164	884	10477	8139	

03/25/91
05:01:53

Equal Employment Opportunity Commission

National Database
Charge Receipt Listing

For Data
Verification
Purposes
Only

CHARGE RECEIPTS 100189 - 093090: FY 1990 Title VII Receipts - EEOC
GRAND TOTAL

Total Records Selected : 51957
Chgs w/ Mult. Bas/Stats: 14453
Chgs w/ Multiple Issues: 19675

STATUTE/BASIS SUMMARY BY ISSUES

ISSUES			TITLE VII				TOTAL	TOTAL			OTHER	TOTAL	TOTAL	% VII	%	
	RACE	RELIG	ORIGIN	RETAL	SEX	OTHER	ISSUES	CHGS	EPA	ADEA	STAT	ISSUES	CHGS	CHGS	CHGS	
A1 ADVERTISING	5	0	5	0	8	4	22	12	1	1	0	24	12	.0	.0	A1
A2 APPRENTICE	28	0	1	1	11	2	44	37	1	3	0	48	37	.1	.1	A2
B1 BENEFITS	406	20	132	143	429	80	1210	959	65	114	0	1389	959	1.8	1.8	B1
D1 DEMOTION	1094	28	255	336	799	103	2613	2006	74	255	0	2942	2006	3.9	3.9	D1
D2 DISCHARGE	15679	825	3435	3463	8968	682	32550	26923	418	1939	0	34907	26923	51.8	51.8	D2
D3 DISCIPLINE	1733	53	313	671	741	61	3572	2721	45	165	0	3782	2721	5.2	5.2	D3
E1 EXCLUSION	53	0	14	16	26	7	116	88	4	7	0	127	88	.2	.2	E1
H1 HARASSMENT	3314	204	1402	1584	2251	321	9076	6153	87	459	0	9622	6153	11.8	11.8	H1
H2 HIRING	2259	198	985	348	1160	87	5037	4067	14	704	0	5755	4067	7.8	7.8	H2
I1 INTIMIDATION	703	41	345	445	504	38	2076	1485	24	126	0	2226	1485	2.9	2.9	I1
J1 JOB CLASS.	243	3	49	63	202	39	599	448	37	44	0	680	448	.9	.9	J1
L1 LAYOFF	1254	36	298	280	805	66	2738	2302	43	297	0	3078	2302	4.4	4.4	L1
M1 MATERNITY	192	4	32	41	1592	45	1906	1627	13	4	0	1923	1627	3.1	3.1	M1
O1 OTHER	1727	106	300	664	1015	98	3910	3045	56	275	0	4241	3045	5.9	5.9	O1
P1 PATERNITY	11	0	6	1	18	1	37	30	1	1	0	39	30	.1	.1	P1
P3 PROMOTION	3192	67	657	727	1557	190	6390	4927	132	493	0	7015	4927	9.5	9.5	P3
Q1 QUALIFICAT.	92	2	24	16	51	3	188	146	1	29	0	218	146	.3	.3	Q1
R1 RECALL	214	7	62	51	119	5	458	400	3	47	0	508	400	.8	.8	R1
R2 REF UNFAVOR	68	3	31	189	48	3	342	285	7	23	0	372	285	.5	.5	R2
R3 REFERRAL	139	5	25	34	47	7	257	199	0	18	0	275	199	.4	.4	R3
R4 REINSTATEMT	139	2	21	43	133	8	346	284	3	22	0	371	284	.5	.5	R4
R5 RETIRE UNVOL	29	0	5	6	20	2	62	54	1	42	0	105	54	.1	.1	R5
S1 SEGREG FAC.	73	0	4	3	30	2	112	81	1	6	0	119	81	.2	.2	S1
S2 SEGREG LOC.	17	0	6	5	11	1	40	31	1	4	0	45	31	.1	.1	S2
S3 SENIORITY	175	3	31	37	96	6	348	277	5	39	0	392	277	.5	.5	S3
S4 SEX HARASS	305	21	125	856	3104	75	4486	3216	55	87	0	4628	3216	6.2	6.2	S4
S5 SUSPENSION	1295	46	228	421	447	35	2472	1967	10	95	0	2577	1967	3.8	3.8	S5
T1 TENURE	37	6	20	18	38	4	123	96	5	15	0	143	96	.2	.2	T1
T2 TERMS OF EMP	4885	209	1242	1672	2769	322	11099	8395	203	676	0	11978	8395	16.2	16.2	T2
T3 TESTING	151	3	19	11	31	3	218	186	2	17	0	237	186	.4	.4	T3
T4 TRAINING	545	9	83	114	249	36	1036	777	20	83	0	1139	777	1.5	1.5	T4
U1 UNION REP.	313	19	66	65	100	7	570	484	0	32	0	602	484	.9	.9	U1
W1 WAGES	2562	67	635	727	2952	1255	8198	5667	1227	501	0	9926	5667	10.9	10.9	W1
TOTAL BAS/STAT	42932	1727	10709	12901	29981	3990	102240	0	2559	6623	0	111491	0			
TOTAL CHARGES	29133	1147	7245	7695	17810	1920	0	51957	1251	4311	0	0	51957			
% TOTAL CHGS	56.1	2.2	13.9	14.8	34.3	3.7	.0	100.0	2.4	8.3	.0					

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TITLE VII CHARGES CLOSED
DURING FY 1990

03/21/91
10:58:40

CLOSURES	RACE	RELIGION	ORIGIN	RETAL	SEX	OTHER	BASIS TOTAL	CHARGE TOTAL	
WITHDRAWN WITH BENEFITS (M1)	1876	69	441	558	1409	395	4748	3654	M1
NEGOTIATED SETTLEMENT (M2)	2572	109	456	783	2027	478	6425	4920	M2
SUCCESSFUL CONCILIATION (M4)	176	11	31	105	237	60	620	447	M4
TOTALS	4624	189	928	1446	3673	933	11793	9021	

909

910

POINTS OF VIEW

OPINION AND COMMENTARY

THOMAS HOMBURGER

Once and for All, It's Not a Quota Bill

Fear and misunderstanding regarding the proposed Civil Rights Act of 1990, approved July 18 by the Senate and pending before the House of Representatives, have resulted in concerns that it would promote quotas and unfairly burden businesses. While the Anti-Defamation League has always fought for strong civil-rights protection and effective statutory enforcement of individual rights, it has fought equally vigorously against the use of quotas, goals, and timetables. Individuals should be evaluated on the basis of their skills—not their skin color or their numerical value to an employer. Race, gender, and ethnic preferences are not legitimate means of affirmative action and do not promote equal opportunity in any meaningful way.

While the Anti-Defamation League does not believe the civil-rights bill would authorize or promote quotas, it does support efforts to clarify further Congress' intent not to have the statutory language encourage quotas or racial preferences. The Senate version explicitly states that nothing in the act should "be construed to require an employer to adopt hiring or promotion quotas."

Much of the criticism concerning quotas could be defused by an objective examination of the bill. Some employers assert that because the Civil Rights Act would make it too difficult and too expensive to defend against discrimination charges, they would rely on quotas to maintain a "proper" percentage of minority employees—which they perceive as insulating them from the threat of costly litigation. In fact, defensive quotas as insurance against litigation are unnecessary, ineffective, and illegal.

Critics charge that the Civil Rights Act would impose liability on employers simply because their work force didn't reflect the racial composition of the community. This claim is based on the misconception that a plaintiff could win a discrimination case merely by showing that an employer had a lower percentage of minorities on the job than were found in the general population. This has never been so, and would not be the case under the new Civil Rights Act.

Not a Numbers Game

To understand this point, we must look at one crucial element of Title VII of the 1964 Civil Rights Act. For almost 20 years, under *Griggs v. Duke Power Co.* (1971), the Supreme Court has held that a seemingly neutral employment practice that has a disparate impact on minorities violates Title VII. For example, an employer's requirement that plumbing apprentices have a high-school diploma may result in discrimination against racial and ethnic minorities. To prove the violation, the plaintiff must produce evidence that ties the "neutral" practice to the discrimination. In other words, the plaintiff must demonstrate discrimination, not simply show "bad" numbers.

Preventing discrimination and defending employment cases is now a cost of doing business.

Importantly, the plaintiff doesn't win the case by showing that minorities comprise only five percent of the work force, while they constitute 10 percent of the community. The proper statistical comparison is between the work force and the pool of qualified applicants. This essential element of proof is *not altered* by the 1990 civil rights bill.

Moreover, during the Senate debate, Sen. David Pryor (D-Ark.) offered an amendment that would make this standard explicitly part of the bill: "The mere existence of a statistical imbalance in an employer's work force on account of race, sex, religion, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation." Although Senate cloture procedures prevented the inclusion of this amendment in the approved measure, Pryor received strong assurances from Sens. Edward Kennedy (D-Mass.) and George Mitchell (D-Maine) that this amendment would be in the final bill.

Once a plaintiff produces the required evidence, the employer can successfully defend the challenged practice by proving that it is justified by "business necessity." The Senate-approved bill defines business necessity in the hiring and promotion context as that which "bear[s] a significant relationship to successful performance of the job." This does not mean that to pass muster, practices must be *absolutely* necessary, as some critics have argued.

Cost of Doing Business

Some would contend that "successful performance of the job" is not the proper standard or is too difficult a standard to meet. But if an employment practice operates to discriminate against a group of people and does not bear a significant relationship to successful job performance, how can the practice be justified? Further, the business-necessity defense does not preclude hiring the best qualified person for a job or setting legitimate criteria for employment.

Is it a burden for employers to have to prove the business necessity of a practice that has a disparate impact on minorities? Yes—to the extent that any civil-rights measure places a burden on business. In 1964 as well, Congress' enactment of sweeping civil-rights legislation changed the way companies did business.

Preventing employment discrimination and being forced to defend against such charges is now a cost of doing business. Federal legislation implementing these prohibitions has been guided by a national commitment to eradicating discrimination and ensuring equal opportunity.

What would be the consequences of the Civil Rights Act of 1990? It would reverse aspects of several 1989-90 Supreme Court decisions that cut back the scope and efficacy of federal civil-rights statutes. Plaintiffs would find it easier to prove claims of discrimination. Employers who intentionally discriminated would be subject to increased and—it is to be hoped—deterrent monetary liability. To the extent that businesses then tried harder to recruit, hire, and promote qualified minorities and women in areas that whites and males had dominated, their efforts would merely reflect the legitimate goals of effective and genuine affirmative action.

Thomas Homburger is chairman of the national civil-rights committee of the Anti-Defamation League, an organization dedicated to countering anti-semitism and racism.

The New York Times, Thursday, August 2, 1990

Civil Rights: The House's Turn

Now it's the House's turn to do right by civil rights and reaffirm law weakened by Supreme Court interpretations. The Senate last month passed a civil rights bill. If tradition holds, the House will pass a strong version of the same bill. Then, after the August recess, both chambers can agree on a strong Civil Rights Act of 1990.

This legislation would not be necessary if the Supreme Court, in half a dozen recent cases, had not given a crabbed reading of landmark job discrimination laws. The Senate bill's main feature is the repudiation of the Court's decision last year in the Ward's Cove case. The Court, by a 5-to-4 vote, overturned a unanimous 1971 precedent that gave employers the burden of justifying business practices that tended to keep out minority group members.

Will restoring the earlier understanding push businesses to use hiring quotas, as the Bush Administration argues? There has been no showing that the Court's 1971 decision caused any such effect.

President Bush also complains that the Senate bill is a "lawyers' bonanza." Proponents offered a ceiling on punitive damages, but senators of Mr. Bush's own party blocked consideration of such a ceiling. The House can now add one and work for its adoption in conference. That could sweeten the bill sufficiently to survive a threatened veto.

House members who want the job bias laws restored and strengthened will reject a substitute bill offered by the Republican leader, Robert Michel, and Representative John LaFalce, a Democrat from Buffalo. Their bill, offered as a fresh compromise, resembles a Republican version already rejected by the Senate. Too much of it appears to endorse those Supreme Court rulings rather than repudiate them. As with great rights legislation of the past, the House is challenged to rise above speculative objections and stand up for civil rights.

The New York Times, Thursday, August 9, 1990

On Civil Rights: No Steps Back

House Republicans went down to defeat on the civil rights bill last week with President Bush's slogans flying. "Quota bill!" they declaimed. "Lawyers' bonanza!" But 64 percent of the House ignored their watered-down alternative and voted instead for the proposed Civil Rights Act of 1990. It was a triumph for reasonableness as well as rights.

Given the earlier approval by 65 percent of the Senate, this minority-rights bill enjoys a super majority. When will Mr. Bush join it? Sadly, he seems bewitched by his own slogans. The President's latest word is that recent amendments "do not result in a bill that I could sign."

Civil rights usually are minority rights. Minorities and women ordinarily must prevail upon white males, whose rights are pretty secure, to share some of their power. That's just what they did a generation ago when the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965 were enacted. But in recent months the Supreme Court has construed hard-won laws so narrowly that even the White House doesn't defend all the rulings.

The bill is no quota bill. It substantially restores the law as interpreted in 1971 by a unanimous Supreme Court and disinterpreted by a 5-to-4 vote last year. It would require employers to justify job practices that disproportionally exclude minorities and women. There's no evidence that this requirement, in the years it was enforced, ever drove employers to self-defensive, reverse-discriminatory quotas.

As for the bromide about a "lawyers' relief bill," a generation of civil rights laws has empowered lawyers without making them rich. Any effective private enforcement of citizen rights requires the service — and compensation — of lawyers. One of the bill's reforms would make it harder for companies settling cases to induce plaintiffs to waive their attorney fees, a maneuver that weakens the ability of civil rights lawyers to stay in business.

House and Senate versions of the bill must be resolved after Labor Day, clearing the way for President Bush to re-examine his odd intransigence. The proposed Civil Rights Act of 1990 takes no steps forward; it's a monument to the need to avoid taking several steps back.

Washington Post, Tuesday, September 18, 1990

Augustus F. Hawkins

The President Wants A Civil Rights Bill?

All it needs now is his signature.

Last spring, President Bush claimed that he wanted to sign a civil rights bill this year but that the Civil Rights Act of 1990 suffered from too many problems. Since then, the sponsors of the legislation have agreed to more than 20 substantive changes in the bill, in order to accommodate the president's concerns. The Civil Rights Act of 1990 is now ready for the president's signature.

One of the bill's principal purposes is to overturn the Supreme Court's *Wards Cove* decision, thereby restoring legal rules that courts have used to resolve employment discrimination suits since the court's unanimous 1971 decision in *Griggs v. Duke Power Company.* These rules bar practices that have a "disparate impact" on the employment opportunities of women or minorities, unless such practices are "necessary." The Bush administration has contended that the bill's disparate impact provisions are too stringent and that they would force employers to adopt hiring or promotion quotas in order to avoid lawsuits they cannot win. A host of substantial changes has been made to meet these concerns.

First, a provision was added stating that nothing in the legislation "shall be construed to require an employer to adopt hiring or promotion quotas." Second, in response to concerns that the bill would enable plaintiffs to prove discrimination simply by pointing to an imbalance in an employer's work force, language was added which provides that "the mere existence of a statistical imbalance in an employer's work force" is "not alone sufficient to establish a prima facie case" of discrimination.

Third, changes have been made to the definition of "business necessity." As introduced, the legislation permitted employers to retain discriminatory employment practices shown to be "essential to effective job performance." To address the concern that this definition was so stringent that employers would never be able to meet it, the bill's sponsors twice changed the standard. A bipartisan group of representatives and senators modified the definition to require that discriminatory practices bear a "substantial and demonstrable relationship" to effective job performance.

After the administration expressed concern that the revised definition was still too difficult for employers to meet, the sponsors agreed to yet another concession. The bill now adopts the *Griggs* standard, providing that in the case of employment practices involving selection (such as hiring and promotion), the practices must "bear a significant relationship to successful performance of the job." An alternative standard has been added for practices that are adopted for legitimate reasons unrelated to job performance.

Fourth, the sponsors added an explicit instruction to the courts that such provisions should be interpreted simply to overrule *Wards Cove* and codify *Griggs*, and nothing more. Language was also added to clarify that damages and jury trials are available only in cases of intentional discrimination. These changes put the specter of quotas to rest once and for all.

The sponsors of the legislation also agreed to other concessions. For example, a plaintiff challenging a group of employment practices is required to identify the specific practices responsible for the disparate impact where he or she can reasonably do so, and plaintiffs may only challenge groups of practices that "produce one or more employment decisions."

Equally important is the modification made to the provision that permits women and religious minorities to

recover compensatory and punitive damages for intentional discrimination, remedies long available to racial minorities under federal law. In response to the administration's contention that this provision could lead to multi-million-dollar damages awards against smaller employers with limited assets, the bill's sponsors made a major concession: they agreed to limit punitive damages awards against employers with fewer than 100 employees to $150,000 or the sum of compensatory damages and other equitable monetary relief, whichever is greater. Ninety-seven percent of all businesses employ fewer than 100 employees and would thus be covered by the cap.

Most of the other provisions of the legislation have been modified as well in response to the administration's suggestions. The standard of proof plaintiffs must meet to establish liability in mixed-motive cases was changed; instead of proving that discrimination was a motivating factor in the challenged decision, plaintiffs must now prove that it was a contributing factor. This change ensures that employers are punished only for discriminatory conduct that actually infects an employment decision.

Thus, the sponsors of the Civil Rights Act of 1990 have made the bill a reasoned, effective response to the Supreme Court's recent misinterpretations of federal civil rights laws.

The Civil Rights Act of 1990 now deserves the president's signature. All agree that hundreds of meritorious employment discrimination cases have been dismissed in the past year as a consequence of the Supreme Court's decisions and that many more acts of discrimination and bias will go unpunished in the future unless this legislation is signed into law. In his 1990 State of the Union Address, President Bush told Congress that we must condemn racism and bigotry "not next week, not tomorrow, but right now." Mr. President, what are you waiting for?

The writer, a Democratic representative from California, is chairman of the House Education and Labor Committee.

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Los Angeles Times
Friday, October 19, 1990

EDI

Wrong Direction on Civil Rights

It doesn't force quotas—Bush shouldn't veto it

If President George Bush makes good on his threat to veto the Civil Rights Act of 1990, it will not only be an act of unfeeling misgovernment, but also another sign of his party's failure to resolve the contradiction between what it says it intends toward minority Americans and what it actually does for them.

When former Ku Klux Klan leader David Duke ran for the U.S. Senate as a Republican, Bush and other GOP leaders were sincerely horrified and rushed to repudiate him. They have been less quick to forswear their party's historic antipathy toward civil rights legislation—an antipathy that made it easier for Duke to call himself a Republican, however uneasy it made GOP regulars feel to hear him say so.

President Bush and the other Republican leaders of his generation are the architects of a strategy designed to wean Southern white and Northern ethnic voters away from their traditional Democratic loyalties. The key element in that approach is the anxiety both groups share about the legal and economic gains women, African-Americans and other minorities have made as the result of the civil rights movement. The GOP's strategy has been an electoral success, but it all too frequently has turned the the party of Lincoln and Emancipation into the party of white male privilege through obfuscation.

It is, of course, the habit of American political discourse to excuse inequality through euphemism: states' rights, separate but equal, reverse discrimination. The circumlocution Bush employs to justify his hostility to the Civil Rights Act of 1990 is "quotas." The President insists the bill will force quotas despite the fact it explicitly says, "*Nothing in the amendments made by this act shall be construed to require or encourage an employer to adopt hiring or promotional quotas on the basis of race, color, religion, sex or national origin.*" But Bush recently wrote: "I am convinced that it will have the effect of forcing businesses to adopt quotas. . . It will also foster divisiveness and litigation. . . and do more to promote legal fees than civil rights."

These observations are hard to reconcile with the bill's explicit disclaimer and its actual provisions. The Civil Rights Act of 1990 aims to reverse six recent U.S. Supreme Court decisions that have weakened existing federal laws against employment discrimination. Among other things, it requires that employers once again bear the burden of legally justifying practices or policies whose objective effect is to create discriminatory patterns in hiring or promotion. It also allows victims of sexual, religious or ethnic discrimination to seek the same compensatory and punitive damages already available to those who have suffered racial discrimination. Fair-minded people will search such proposals in vain for the dire consequences over which Bush frets.

The President already has said he will allow a bill restricting advertising on children's television to become law without his signature, even though he personally feels it abridges some First Amendment freedoms. Americans are entitled to wonder why he cannot do the same for the Civil Rights Act of 1990.

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The Washington Post, Thursday, October 18, 1990

Sign the Civil Rights Bill

THE ADMINISTRATION is riding to the aid of the wrong victims in the civil rights bill. The problem is not quotas that might occur, but discrimination that has. As Justice John Paul Stevens wrote in dissenting from the Supreme Court decision that is at the heart of the dispute, and that the legislation seeks to overturn, the issue is the "probative value" to be given to "evidence of a racially stratified work force."

The Supreme Court held in 1971 that such evidence deserved to be given great weight and was a strong enough signal of discriminatory employment practices to shift a heavy burden of proof to the employer; the employer would have to show that the hiring and promotion practices producing the stratified result were based on business necessity. Last year the new Reagan majority on the court weakened that requirement. The current bill would rightly strengthen it again.

The business groups and others fighting the legislation say it has been overwritten to the point that no employment practice failing to produce proportional results in hiring or promotion would be safe in court. From this they contend that businesses seeking to protect themselves from discrimination suits would have no choice but to resort to tacit quotas.

But that's a vast exaggeration of what this relatively modest bill would do. The proposed new language would no more lead to quotas than did the carefully balanced court decision of 18 years' standing that it would replace. This has not been a fight about quotas, but for the most part a fight between equal-employment plaintiffs and defense attorneys for marginal tactical advantage in future lawsuits.

Once in a while as they have struggled, the adversaries have stepped outside this narrow band to touch on broader issues better left alone. The administration thus proposed at one point that an employment practice be allowed to stand, no matter what its effect, if it was adopted for "legitimate" community or customer-relations purposes. That seemed to suggest an employer could avoid a hiring or promotion decision on grounds that it would offend community or customer tastes; the community would be given a veto over the law. The country fought that issue out long ago. The administration subsequently said that wasn't what it had meant. We truly hope so.

The president's advisers have this one wrong. He should sign the modest bill and get this artificial and unnecessary fight behind him.

Legal Affairs

THE WORKPLACE

ENDING SEXUAL HARASSMENT: BUSINESS IS GETTING THE MESSAGE

Working women and the courts are forcefully rewriting the rules of workplace relations

American National Can Corp. was making an effort to put more women in a traditionally male area when it hired Jacquelyn L. Morris in 1981. Morris worked as a machinist in its Pevely (Mo.) bottle-making plant. By the time she resigned in 1987, she had the top seniority in a unit with 12 men. Her performance ratings were "good" or "excellent." But she was miserable. Her male bosses and co-workers wouldn't leave her alone.

"You have a nice ass," the unit manager told Morris several times as he patted her buttocks. She'd find photos of scantily clad women at her workbench. At first, Morris was too embarrassed to complain. But on July 16, 1986, three months after the other female in the unit had quit over harassment and two days after Morris found a photo of an erect penis on her toolbox, she went to the Equal Employment Opportunity Commission (EEOC), and then to court. "All I wanted was for the harassment to stop. After I filed a complaint, however, the harassment escalated," she said.

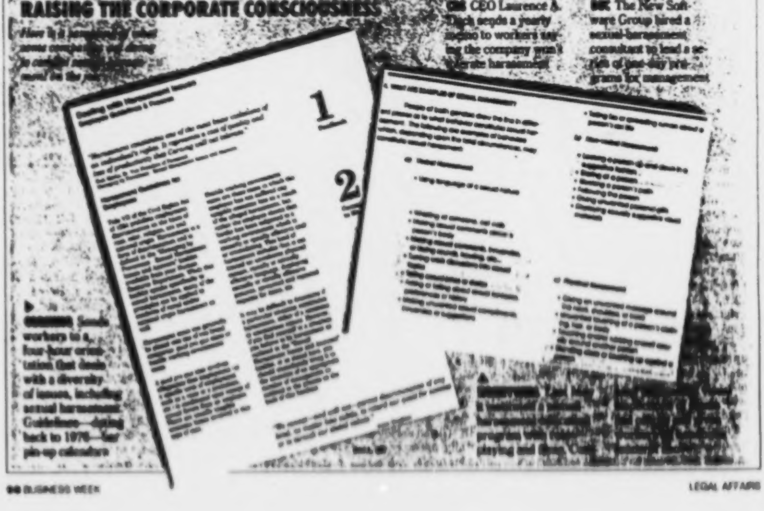
PUNITIVE DAMAGES? The company argued that Morris had provoked the treatment she got. Her boss told the court that Morris should have done more to stop the incidents. While American National Can rehired Morris in late 1987, the judge faulted it for not taking her complaints seriously enough: The company's supervisors "apparently expected that occasional, mild rebukes of employees about 'horseplay' and 'pranks' would put a stop to what, in fact and law, was serious sexual harassment." He awarded Morris $16,000 in back pay and interest. And he ordered the company to set up a training program and complaint system, which it says it did.

The ruling is one in a wave of decisions that are rewriting the rules governing conduct between the sexes in the workplace. Unlike other sectors of corporate life, where standards were relaxed in the Reagan era, the rules governing sexual harassment grew tougher in the '80s. Now, courts are stretching the definition of sexual harassment. And they're raising the stakes.

So some employers are stepping up their efforts to fight sexual harassment—which is almost always directed at women. "It's a very definite trend: Companies take sexual harassment more seriously," says Donna L. Harper, a senior attorney in the EEOC's St. Louis office, speaking of her experience.

This emerging concern largely reflects

RAISING THE CORPORATE CONSCIOUSNESS



[illegible] CEO Laurence A. [illegible] sends a yearly memo to workers saying the company won't tolerate harassment

The New Software Group hired a sexual-harassment consultant to lead a series of one-day programs for management

[illegible] Sends workers to a four-hour orientation that deals with a diversity of issues, including sexual harassment. Guidelines—dating back to 1978—bar pin-up calendars

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the growing ranks of female employees, particularly in nontraditional work environments, say observers such as Michael J. Hoare, Jackie Morris' lawyer: "Women are getting more and more aggressive about asserting these rights."

Congress may also step in. A Democrat-sponsored civil rights bill pending in the House would amend the federal antidiscrimination law to give workers the right to jury trials and to punitive damages for sexual harassment. A Bush Administration counterproposal would do the same but would cap punitive awards at $150,000. The current law entitles victims only to back pay or reinstatement if they leave the job or are fired.

"No longer can there be a boy's atmosphere," says Susan M. Benton-Powers, a Chicago lawyer who advises companies on employment issues. "No longer can the wary employer get away with saying 'Be tough. That's not a big deal.' They have to investigate complaints. Otherwise, they can be held liable."

UNWELCOME CONDUCT. Companies seeking to avoid suits may have to redress behavior many males never notice. The influential U.S. Court of Appeals for the Ninth Circuit in San Francisco recently ruled that sexual harassment has to be judged, not by the prototypical "reasonable man" rule, but by the standards of a "reasonable woman." If upheld, the change won't be just semantic. "Conduct that many men consider unobjectionable may offend many women," wrote Judge Robert R. Beezer in an opinion with Judge Alex Kozinski. Noted the Reagan appointees: "Because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum."

In the case, the alleged harasser, Sterling Gray, apparently became smitten with an IRS co-worker, Kerry Ellison. After she declined his lunch invitations, Gray wrote her a barrage of love letters. She reacted with fear about "what he would do next." The trial judge threw out her complaint. He called Gray's conduct "isolated and trivial." But the appeals court refused to call Ellison's behavior hypersensitive for a reasonable woman. Instead, it ordered a new trial. The IRS may appeal.

Some companies have long been concerned about such behavior. But now, they're doing more. They are printing booklets that spell out subtle but inappropriate conduct. They're holding role-playing sessions. Some are even hiring consultants or auditing work areas for girlie pin-ups (table).

Honeywell Inc., where women make up nearly 40% of the work force, is actively taking steps to avoid the problem. Last year, its in-house art gallery featured a photo show with shots of nude women. But women were made uneasy by men giggling at the photos. "We had to take the whole exhibit down," says lawyer Barbara A. Jerich, work-force diversity director. "It was not racy. It was art. But the context in which it was viewed was not appropriate."

Many companies still find plenty of reasons not to spend the time or the cash to deal with the issue—until faced with an embarrassing suit or high turnover rate. Freada Klein, a Cambridge (Mass.) consultant, explains that all but the most offensive behavior is tough for companies to sort out. Often, the harassment follows an office romance gone sour. Or complaints aren't effectively communicated. Companies also fear, with some justification, says Honeywell's Jerich, that education spurs claims: Workers know their rights.

One situation where men and women often differ markedly in judging whether sexual harassment is taking place involves comments on clothing, says Trisha Brinkman, a San Francisco-based consultant on sexual harassment. "The question is always 'Is it harassment or a compliment?' " says Brinkman. "People know the difference between saying that's a nice dress, and that's a *nice* dress. One of the myths is that women cause [these comments] by wearing certain types of clothes. But this is not about sexual attractiveness, it's about abuse of power."

QUID PRO QUO. Not too long ago, sexual harassment wasn't even recognized as a problem for the courts. A few cases appeared in the mid-1970s. In 1980, the EEOC put out guidelines that identified two types of sexual harassment. The more obvious is "quid pro quo"—sleep with me or you're fired. The second type, which doesn't include direct sexual overtures, is hostile-environment harassment. The scary part for companies is that in environment cases, the behavior can be cumulative. Thus, raunchy jokes, lewd graffiti, and repeated sexual advances add up. The critical determinant query for all harassment is: Was the conduct "unwelcome?"

The turning point for employers came in 1986. In its first and only ruling on the subject, the Supreme Court "pretty much told companies they'd better get out there," says attorney Benton-Powers. In the case, *Meritor Savings Bank vs. Vinson*, the court held unanimously that sexual harassment violates Title VII of the 1964 Civil Rights Act if it is unwelcome and "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

Many companies responded to *Meritor* and the EEOC with a one-shot policy approach. They inserted sexual harassment policies into personnel handbooks or updated existing ones. Typically, they lifted the lawyerly language of the EEOC guidelines. But courts kept finding that they failed to publicize such policies or circumvented them.

The companies also got more serious at policing blatant misconduct. And the number of quid pro quo cases leveled off, lawyers say. But environmental-harassment cases increased steadily. Overall, EEOC sexual-harassment complaints grew from about 4,400 in 1986 to about 5,600 in 1990. The more liberal state courts, meanwhile, have had a surge of harassment-based claims because of the potential for greater damages and punitive awards.

To help companies sort through the rulings, the EEOC last spring published what it calls "guidance." In determining liability, the agency said, key factors are whether the employer has an effective internal grievance procedure that allows employees to bypass immediate supervisors—often the offenders.

In January, a federal judge in Florida

took on a fixture in many male-dominated shops: cheesecake calendars and girlie posters. Judge Howell Melton called them a "visual assault on the sensibilities of women." The case involved a female welder, Lois Robinson, at Jacksonville Shipyards Inc. After she had complained about "pornography" in the shop, her male co-workers cracked dirty jokes and brought in more X-rated stuff—evidence, the judge concluded, of an illegal hostile environment. While President Roger Palmer refuses to discuss the case, which involves events before he took over, he says the yard will abide by whatever the judge eventually orders it to do.

To be sure, plenty of pin-up posters remain on the walls of American companies and are used as marketing tools (box). Indeed, many corporate leaders consider problems of sexual harassment to be exaggerated, especially by plaintiffs' lawyers and consultants who have an interest in doing so. And, despite strong evidence, alleged offenders sometimes get sympathy from the courts. On Feb. 6, a federal judge in Arlington, Va., ruled that a former secretary at USLICO Corp. was not sexually harassed even though her boss repeatedly massaged her back and followed her to the bathroom. Judge James C. Cacheris compared the newly divorced defendant to a "faithful dog, constantly expressing his affection and hoping to receive more of the same." The plaintiff has appealed.

As more companies learn to deal with traditional types of offensive conduct, new forms of harassment keep appearing. Women say they now are receiving sexually provocative electronic mail and finding obscene messages on answering machines. Some are even complaining about X-rated software on company computers. With the possible ways of sexually harassing a co-worker almost limitless, what constitutes unacceptable behavior in the workplace may continue to outpace companies' efforts to stop it.

By Michele Galen in New York, with Zachary Schiller in Cleveland, Joan O'C. Hamilton in San Francisco, and Keith H. Hammonds in Boston

SEX STILL SELLS—BUT SO DOES SENSITIVITY

Sex sells. But how advertisers use it is changing. Women show up in far more roles in today's ads than they did a few years ago. Companies are seeking not only to avoid offending women sensitized to exploitation by a generation of feminism but also to target them as new consumers.

But don't expect an end to sex-laced appeals, crude or discreet. If some are more restrained, it's mostly because the soft sell is successful. And it won't end debate over whether women are too often depicted as sexual objects.

Marketers such as US West Inc. are certainly paying more attention to how women appear in their ads. The Baby Bell used images from the old West to show its competitiveness when it emerged from the AT&T breakup. At least a few employees grumbled that the campaign was too macho. But the company made a point of finding cowgirls as well as cowboys for the ads. Says a US West official: "We tried very hard to make those ads pluralistic."

Software maker Lotus Development Corp. has killed a marketing brochure that showed a busty woman in a revealing T-shirt. And Ford Motor Co. broke with tradition at this year's auto show in Detroit. It hired actors reflecting real-life customers rather than feminine beauties to point and smile at revolving machines. It had good reason: 47% of its new-car buyers are women. Such numbers, and the need to flaunt products' unique advantages, have more carmakers moving beyond hyping autos with sex appeal. Some advertisers even turn the tables on male standards: Naturalizer urges women to pick shoes they like and to reject uncomfortable ones.

Some on Madison Ave. say AIDS and growing moralism are reinforcing the trend. And aging baby boomers are fostering a new family focus, more tender romance, and less explicitness.

Ask the person who drives one.
IF SHOES ARE LIKE MEN
IT DOESN'T MATTER
HOW GOOD THEY LOOK
IF YOU CAN'T
LIVE WITH THEM.

THE NEW SEX APPEAL: CAR, SHOE, AND PHONE SERVICE ADS AIMED AT WOMEN

"We're all parents now," says John Nieman, chief creative officer at D'Arcy Masius Benton & Bowles Inc. "Saturday night fever is behind us."

Of course, this doesn't mark the end of sexual innuendo. "Advertisers were more scared of offending women three years ago," when feminists were more unified and quicker to protest, says Barbara Lippert, a senior editor at *Adweek* magazine. She calls the still-booming health-and-fitness craze "an excuse to show more body parts."

ARTFUL OR AWFUL? Certainly, many jeans ads flaunt flesh. Ads for Calvin Klein's Obsession show provocative nude bodies. And there's still no shortage of girlie pin-ups. Emerson Electric Co.'s Ridge Tool prints up 600,000 of its biennial bathing-suit calendars. Peter Hayward, Ridge's advertising director, calls them a "useful tool" for getting the company's name out to users.

Whether such ads seem artful or awful depends on the buyer. Stephen J. Burrows, Anheuser-Busch Co. vice-president for brand management, claims most of his customers find nothing wrong with ads sporting bikini-clad models. "We don't think we depict any individual in a less-than-responsible fashion in ads," Burrows says. "And the discussions we've had with consumers support that view."

For marketers, then, the answer to where sensuality ends and insensitivity begins still starts with the old query: Does it sell?

By Zachary Schiller in Cleveland, with Mark Landler in New York and Julia Flynn Siler in Chicago

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News

Law Firm Liable for Sex Bias

Judge rules female associate held to higher partnership standard than males

A recent sex-discrimination decision is expected to have far-reaching consequences for law firms. But the impact on plaintiff Nancy Ezold probably won't be determined until at least this spring, when a judge rules on damages.

The case, *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, No. 90-0002 (Nov. 29), arose when Ezold, an associate at a Philadelphia law firm, was denied partnership and sued.

U.S. District Judge James McGirr Kelly found that many male associates who did make partner at Wolf, Block, Schorr & Solis-Cohen were less qualified than Ezold. While none of the evaluations of the plaintiff contained explicitly sexist comments, Kelly ruled that Ezold was unlawfully held to a different, higher standard than her male colleagues.

While Kelly found that the firm's refusal to promote Ezold was a Title VII violation, he ruled against her on a constructive-discharge claim. "Ms. Ezold was not harassed, belittled, or otherwise pressured to leave Wolf, Block," he said.

A Profound Effect

"I think the litigation has already had a profound effect on law firms," said Ezold's attorney, Judith Vladek of New York's Vladek, Waldman, Elias & Englard. "They're taking another look at their partnership procedures."

What has critics worried is judicial second-guessing of partnership decisions. "If courts are going to review partnership, there's going to be much more emphasis on documentation, on keeping an eye on how a firm will justify every decision it's making," warned Mark Dichter of Philadelphia's Morgan, Lewis & Bockius, who represents Wolf, Block.

"And that's going to affect smaller firms even more than the larger ones. The costs are going to be enormous."

Damages will be determined at a separate trial. Ezold wants to be reinstated to partnership just as accountant Ann Hopkins was in a similar case, *Hopkins v. Price Waterhouse*, No. 90-7009 (Dec. 4). (See "New Title VII Remedy," February 1991 *ABA Journal*, page 24.)

Nancy Ezold: Her desk became a "pink ghetto" of routine matters.

Defense lawyers will argue that damages should be limited to the increased income Ezold would have earned between Feb. 1, 1989, when she was denied partnership, and June 7, 1989, when she quit.

Unlike *Hopkins*, in which evaluations made explicit reference to the plaintiff's femininity and to sexual stereotypes, Ezold's case required more intensive scrutiny of the partnership-evaluation process. In findings of fact issued Nov. 29, Kelly highlighted the shortcomings and gaffes of males promoted to partner that were disclosed in performance evaluations.

Ezold, a graduate of Villanova Law School, became an associate at the large and prestigious Wolf, Block in 1983 after working at two small Philadelphia law firms. She had practical experience in client relations and trial practice.

One partner at the time of her hiring told Ezold she would have a hard time because she was a woman, because she hadn't graduated from an Ivy League school and because she hadn't been on law review. The words would come back to haunt the litigants—being seen by the plaintiff as proof of the firm's sexism.

At the new firm, Ezold worked primarily in white-collar defense and commercial litigation. In annual reviews, partners queried whether she could handle the large and sophisticated antitrust and securities cases on which the firm prides itself.

As the years passed, more partners steered complex matters away from Ezold and her desk became a pink ghetto of smaller, more routine matters.

In 1988, the partnership evaluation committee decided that she should not be made partner but that she should be encouraged to remain in the firm. After Ezold learned of the decision, the head of the domestic-relations department left the firm. Ezold was offered the outgoing partner's position and promised a partnership if she took it. She refused.

"Domestic relations, tax, estates and trusts," Vladek comments. "These are the departments where women have always been dumped."

With an appeal almost certain, Ezold may have many years before she needs to clean out her desk at her present job at the five-person Philadelphia firm of Rosenthal & Ganister, where she specializes in white-collar crime, commercial litigation and government contracts.

But Ezold is patient and determined. "The court has already decided that Wolf, Block discriminated against women," she says. "The only question is whether *this* woman should be made partner. The answer ought to be yes."

She adds that although she wants to be a partner at Wolf, Block, "I'm certainly interested in money damages if we do not get reinstatement." *—ArLynn Leiber Presser*

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Woman who sued Phila. law firm testifies on federal civil rights bill

By Alexis Moore
Inquirer Washington Bureau

WASHINGTON — When Nancy O'Mara Ezold joined a prestigious Philadelphia law firm in 1983, the man who hired her told her she wouldn't have an easy time because, as a woman, she "did not fit the mold."

Yesterday, she told a congressional panel that "he was right."

Ezold won a nationally watched lawsuit against Wolf, Block, Schorr & Solis-Cohen when a federal judge in November ruled that she had been discriminated against on the basis of sex when the firm denied her a partnership in 1989. The case is believed to be the first instance in which a female lawyer's discrimination suit against her employer went to trial. Other cases were settled out of court.

Despite the ruling, Ezold told the House Education and Labor Committee, she will never receive adequate compensation under current job-discrimination laws because they do not permit women to seek punitive damages in cases of intentional discrimination by employers.

Ezold testified during a hearing on the proposed Civil Rights Act of 1991, designed to overturn five 1989 Supreme Court rulings that narrowed job-discrimination protections. The bill also would allow women for the first time to seek compensatory and punitive damages in claims of intentional discrimination by employers.

Opponents of that provision say it would encourage litigation resulting in multimillion-dollar damages, or a "lawyers' bonanza," as Rep. Harris W. Fawell (R., Ill.) put it yesterday.

Ezold, 48, said women would be reluctant to sue because if they did they would be exposed "to all-out public attacks on [their] education, training, work experience, management ability, personality traits and intellectual ability ... and also permanent damage such attacks can cause" to careers.

Last year, President Bush vetoed a similar bill, saying that it would have led employers to adopt quotas based on sex or race to avoid being sued.

Last week, Senate Minority Leader Bob Dole (R., Kan.) introduced an administration-backed bill that would allow victims of sexual harassment to collect damages of up to $100,000 for the first incident and up to $150,000 for each subsequent act.

Other witnesses yesterday included economist Heidi Hartmann of the Institute for Women's Policy Research. She said that allowing monetary relief was both "necessary and desirable," not only to afford women equal pay and career opportunities but also to "enhance the nation's economic growth."

Further, she said, "if discrimination costs money, people will stop doing it."

Nancy O'Mara Ezold
Won nationally watched suit

Daily Labor Report

WOMEN ASSERT NEED FOR STRONGER REMEDIES FOR HARASSMENT UNDER CIVIL RIGHTS LAWS

The existing remedies for sexual harassment under Title VII of the 1964 Civil Rights Act are not enough to deter discrimination in the workplace, an economist and a sociologist who specialize in women's employment issues told the House Education and Labor Committee Feb. 27.

Current remedies "allow bottom-line oriented CEOs to simply buy off complaints," charged Freada Klein, a Boston sociologist who conducted a 1988 survey of sexual harassment in the Fortune 500 companies. "Allowing full compensatory and punitive damages would remove some of the barriers to employees' willingness to pursue litigation and, more importantly, would provide a stronger incentive for employers to implement effective remedies for intervention and prevention."

Two victims of sex discrimination, including the first woman to successfully challenge a law firm's partnership decision, also spoke out in support for the additional monetary remedies and jury trials that pending omnibus civil rights legislation (HR 1) would incorporate in Title VII.

The committee hearing, the first to be chaired by Rep. William Ford (D-Mich), focused on sex discrimination and the remedies provision of the proposed legislation, which would also reverse a series of 1989 Supreme Court decisions that were unfavorable to plaintiffs in discrimination suits and make a series of other changes in civil rights laws.

Business groups expressed sharp opposition to the additional remedies during lengthy debate last year over a similar bill that was eventually vetoed by President Bush. Testimony submitted to the panel on behalf of the National Association of Manufacturers and the Society for Human Resource Management reiterated that criticism, calling the expanded remedies "unwise."

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Wage Gap Tied To Discrimination

Heidi Hartmann, a labor economist and director of the Institute for Women's Policy Research, said that recent economic trends on women in the job market substantiate the need for strengthening existing laws.

Women- and minority-dominated occupations "pay substantially less" even when the work is substantially similar, Hartmann said, and two National Academy of Sciences Reports on women's employment has concluded that "about half the gap" between women's and men's average wages is due to employment discrimination.

She said that another NAS survey and one by the Institute for Women's Policy Research showed that stronger enforcement of EEO laws brought greater gains for protected individuals. An IWPW analysis of the 1978 pregnancy discrimination amendment to Title VII found that the law provided "substantial benefits" to female workers in 10 years since its implementation. Over the decade, the number of women of childbearing age increased in the job market at greater levels than any other age/gender group and women earned $1 billion a year in short term disability—most of which became available because of the amendments.

"The change in women's labor market behavior was so large in the 1978 to 1988 period and the increase in women's return to work after childbirth so great, that one is forced to conclude that employer behavior prevented many women from returning to work previously," she said.

The "social science evidence" indicates similar impact from strengthening civil rights laws, Hartmann said. "Allowing aggrieved individuals to sue for damages strengthens enforcement; this provision can be expected to be reflected in future earnings and employment data," including productivity gains and higher rates of economic growth.

Rep. Harris Fawell (R-Ill) asked Hartmann whether the "drastic and very significant change" that the new remedies would bring to traditional employment laws were warranted. The change, he said, would mean abandoning the traditional precedent of conciliation and remedial remedies in labor law in favor of "tortifying" the system.

"That's the difference between economists and attorneys," Hartmann responded. "You look at precedents, we look at data. The data supports [the increased remedies]."

Equitable Remedies Insufficient

Nancy Ezold, who successfully challenged the denial of a partnership at the Philadelphia law firm of Wolf, Block, Schorr and Solis-Cohen last year (230 DLR A-9, 11/29/90), said that the equitable remedies currently available under Title VII are insufficient. They "cannot compensate for the emotional and career damage to one's life work," Ezold said. "They are also not enough of a deterrent—just a cost of doing business."

In the first case of its kind to go to trial, a federal judge in Philadelphia ruled that the firm discriminated against Ezold by denying her a litigation partnership, while awarding partnerships to less qualified men. The court has not yet issued a ruling on the remedies to be awarded, she said, and Wolf, Block has promised to appeal.

"The remedies available under Title VII do not permit the court to make me whole for the losses I suffered," said Ezold, who is currently of counsel to a five-attorney firm in West Chester, Pa. "That lack of make-whole relief infects the decision-making process because a woman who asserts her statutory rights knows that the defense will most likely involve an all-out public attack. . . . Not only must she endure public embarrassment, but also the permanent damage such attacks cause on her career."

Hearings on the legislation will continue Feb. 28 before the Judiciary Subcommittee on Civil and Constitutional Rights and March 5 before the Labor and Education Committee.

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New Fight Brews Over Rights Bills

By Stephanie Saul
WASHINGTON BUREAU

Washington — Brenda Berkman fought her way onto the New York City Fire Department in court by challenging a physical test that required applicants to scale an eight-foot wall.

The test kept women from qualifying, but it didn't really measure the skills necessary to be a firefighter. The eight-foot wall "became not just a stumbling block, but a literal barrier for almost all women taking the exam," U.S. District Judge Charles Sifton ruled in 1982, knocking down the wall and some of the other bars discouraging would-be women firefighters.

But in the decade since Berkman won her lawsuit and her post in a Brooklyn fire unit, the U.S. Supreme Court has changed the rules. One 1989 decision, Wards Cove vs. Atonio, altered the standards used when courts analyze the fairness of selection practices, such as tests, that unintentionally keep out women and other minority applicants. The decision placed the burden on plaintiffs to prove that practices that discriminate against them aren't necessary to accurately measure an applicant's or employee's ability to perform.

"If Wards Cove had been decided in 1979, rather than 1989, New York City would probably still not have a single woman firefighter," Berkman told the House Education and Labor Committee last week. Today, there are 35 women on a force of 11,000.

Sex Bias in the Sewer? Page 19

Berkman's story illustrated just one of the ways women would benefit from the adoption of House Resolution 1, this year's version of last year's vetoed civil rights legislation, proponents of the legislation say. Among other things, the legislation, which will come to a vote this spring, would overturn the Wards Cove decision.

Smarting from a 1990 defeat in which the legislation was successfully cast as a "quota bill" by its opponents and ultimately vetoed by President George Bush, advocates of the bill are seeking a broader base of support.

The shift was evident last week at Shiloh Baptist Church here, when the Rev. Jesse Jackson, reeling off the names of women in Operation Desert Storm, urged the passage of HR 1.

The bill also would help white men, Jackson argued. "It is not a minority rights bill. It is an economic rights bill," he said.

Last year, an attempt to override the president's veto failed in the Senate by one vote. Despite the narrow margin, it is unclear whether those who want to upend the Supreme Court rulings can defeat the immensely popular Bush.

As House committees prepare to send the bill to the floor, the White House has submitted its own legislation that civil rights proponents say is actually a step back from the administration's position last year.

The bills, which seek to amend the 1964 Civil Rights Act, would have vastly different effects on workers' rights.

Newsday / Liliana Nieto
Brenda Berkman broke firefighter barrier

The House bill, for example, would give women and religious minorities the right to sue for damages in cases of intentional discrimination. The administration's proposal would allow damages for cases of harassment, defined as practices that create an intimidating, hostile or offensive working environment.

The White House proposal, however, would cap those damages at $150,000 and would require that the cases be

Please see RIGHTS on Page 47

Refugees Scavenge In Italy

THE ASSOCIATED PRESS

Brindisi, Italy — Thousands of Albanian refugees wandered the streets of this port city in search of food yesterday after spending the night in plastic bags on the docks or on classroom floors. Rain added to their misery.

In Albania, authorities tried to stem the flow of people fleeing the country. A journalist with the official media said Albanian police and military forces stormed a ship in the port of Durres and forced hundreds of would-be refugees off the boat and out of the harbor.

The police and military fired their weapons to force people off the ship, and up to 10 people were wounded, said the journalist, reached in the Albanian capital of Tirana. He cited a report on Albanian state radio.

The Italian government, which has been criticized for its slow response to the influx of Albanians, said Saturday that it would begin dispersing some of the 20,000 Albanians to refugee camps around the country. A trickle asked to return home.

Vatican media denounced the "grave and intolerable" conditions faced by the refugees and blamed government authorities for failing to act swiftly.

In one happy incident, a young Albanian woman gave birth in a Brindisi hospital.

An Italian delegation is to travel to Albania to discuss the refugee emergency.

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Another Fight Is Brewing On Civil Rights Legislation

RIGHTS from Page 13

heard by judges, not juries. It would also force workers to exhaust company grievance procedures.

The House bill seeks to overturn or modify the effect of six Supreme Court decisions, all made in 1989, that activists said took away many of the employee protections granted by the 1964 Civil Rights Act.

The Wards Cove decision is the most controversial of those. Opponents of the House bill claim that attempts to overturn the Wards Cove ruling will lead to quotas in hiring.

The case involved complaints by cannery workers at two Alaskan salmon canneries, mainly Alaskan Indians and Filipinos. More skilled, higher-paying jobs in the company went to white workers. The cannery workers complained that hiring practices, such as nepotism and failure to promote from within, resulted in the disparity.

The Supreme Court ruled against the workers, saying they had to prove that the business practices that caused imbalanced work forces were not justified by business necessity. Both the House bill and the administration's proposal would shift the burden back to the employer to prove a "business necessity" for the practice that results in the statistical imbalance.

The key difference in the two bills is how they define the term "business necessity.".

The House proposal would require the company to show that the employment practice that led to the statistical imbalance bore "a significant relationship to successful performance of the job." Employers argue that that definition of business necessity will lead to the establishment of hiring quotas.

The administration proposal would require only that the employment practice had a "manifest relationship to employment" or that the company's "legitimate employment goals are significantly served by, even if they do not require, the challenged practice."

Applied to Berkman's case against the fire department, the department would have had to prove only that a requirement that firefighters climb the eight-foot wall significantly served its employment goals.

The House bill also would overturn or modify five other Supreme Court decisions:

- Martin vs. Wilks. The House bill would bar those affected by discrimination consent decrees — such as white firefighter applicants — from intervening after consent agreements, such as those establishing quotas for hiring minority firefighters, are final. The administration's bill would allow such challenges.
- Price Waterhouse vs. Hopkins. This decision found that once a worker proved race or sex played a role in an employment decision, the employer would be liable unless it proved the same decision would have been made based on other factors. Employment rights advocates feared the decision was confusing, and the House bill clarifies the law.
- Independent Federation of Flight Attendents vs. Zipes. The House bill would allow recovery of attorneys' fees by workers who win discrimination cases that are then challenged by a third party. The administration bill doesn't address the issue of attorneys' fees.
- Patterson vs. McLean Credit Union. Both the House bill and the administration proposal would make it clear that the Civil Rights Act of 1964 bans racial harassment and discrimination in the performance of contracts, not just in making the contracts.
- Lorance vs. AT&T Technologies. The White House proposal, as well as the House bill, would overturn the effect of this decision, tying the deadline for challenging seniority plans to the date when the worker was harmed, not the date the plans took effect.

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

March 8, 1991

Zachary D. Fasman, Esquire
Paul, Hastings, Janofsky & Walker
1050 Connecticut Avenue, N.W., 12th Floor
Washington, DC 20036

Dear Mr. Fasman:

Thank you for appearing before the Committee on February 27, 1991, to testify in regard to H.R. 1, the Civil Rights Act of 1991. Your comments and prepared statement will constitute an important part of the hearing record.

As the questioning of witnesses was, unfortunately, somewhat abbreviated, I would appreciate your comments on a few matters that concern me. Please see the enclosure. In order for your comments to be included in the hearing record, your written response would need to be received before the record closes on Tuesday, March 12, 1991.

Should you have any questions, please do not hesitate to contact Randy Johnson, Republican Labor Counsel, at (202) 225-3725.

Sincerely,

Bill

WILLIAM F. GOODLING
Ranking Republican Member

WFG:RKJ/kw

Enclosure

Questions for Mr. Zach Fasman

1. Please elaborate on the role of statistical evidence in proving intentional discrimination, particularly in class action types cases. Are workforce comparisons used in much the same manner as under disparate impact theory?

   Would the existence of punitive and compensatory damages place pressure on employers to take steps to avoid workforce comparison imbalances?

2. Is direct evidence of discrimination, such as statements by the employer, necessary to prove intentional discrimination, or do these cases more typically turn on circumstantial evidence?

3. Your testimony did not address those provisions of H.R. 1 allowing "grouping" of practices except, apparently, where the court found that the plaintiff could have identified "which specific practice or practices contributed to the disparate impact . . . ." Do you believe that these provisions would pose problems?

4. Do you believe that the so-called "Shea and Gardner" study on damages under 42 U.S.C. 1981 is a valid predictor of future Title VII litigation if Title VII were to be amended to allow punitive and compensatory damages? If not, why not?

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March 11, 1991

VIA MESSENGER

Congressman William Goodling
Ranking Republican Member
Committee on Education and Labor
United States House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515

Re: H.R. 1

Dear Congressman Goodling:

Thank you for asking me to comment further on several aspects of H.R. 1 that did not come up during the hearing at which I testified. The issues that you have raised are very important and deserve further comment. I am pleased to respond to your inquiries, which I have listed below in full prior to commenting upon them.

1. Please elaborate on the role of statistical evidence in proving intentional discrimination, particularly in class action types cases. Are workforce comparisons used in much the same manner as under disparate impact theory?

Would the existence of punitive and compensatory damages place pressure on employers to take steps to avoid workforce comparison imbalances?

Comment. Before responding to your inquiry, I wish to underscore a vital point made but not highlighted in my written comments to the Committee; H.R.1 would allow compensatory and punitive damages, and jury trials, in class actions under Title VII of the Civil Rights Act of 1964.

The proponents of this legislation consistently have argued that the expanded remedies in question will apply only to cases of "intentional discrimination." In fact, as I observed in my prior comments, the bill would allow compensatory and punitive damages, and jury trials, in any Title VII case not premised upon a disparate impact theory of discrimination. This would include not only individual claims, but class actions premised upon the disparate treatment theory of discrimination.

In such actions, the plaintiff must prove that discrimination was the employer's standard operating procedure, its normal practice. Statistical evidence frequently is used for this purpose. For example, in a disparate treatment class action attacking an employer's promotion policies, a minority plaintiff might use statistics to show that fewer minorities are promoted than would be expected by their presence in the relevant pool in the workforce. This is much the same premise that would be used in a disparate impact case, which would arise if the plaintiff chose to attack one specific aspect of the promotional process (e.g., an allegedly unlawful test) as opposed to the results of the promotion process as a whole.[1] While some courts have required additional proof in disparate treatment class actions, on the theory that statistical evidence alone may not prove that the employer's standard operating procedure is discrimination, this trend is not uniform. Moreover, most courts that require additional non-statistical evidence in disparate treatment class actions generally require only anecdotal evidence to support the plaintiff's claim.

In other words, the premise under which statistical evidence is used in disparate treatment class actions is very similar to that used in disparate impact cases. Indeed, because these theories as applied in class actions are so similar, I observed in my initial written testimony that plaintiffs will tend to abandon the disparate impact theory entirely in class cases, in order to take advantage of the significantly expanded remedies made available in such cases by H.R. 1. I adhere to this view.

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[1] In a disparate impact case, plaintiffs also typically would demonstrate that the specific employment practice has a disparate or screening impact.

This possibility would impose enormous pressure upon employers to hire and promote in a race and sex conscious manner. Unlike disparate impact cases, where an employer can prove that a challenged practice is justified as a business necessity, there is no "justification" defense in a disparate treatment class action. In fact, H.R. 1 itself provides that the business necessity defense applies only to disparate impact claims. (Section 4). It is fair to say that in disparate treatment class actions, while the plaintiff's initial burden is somewhat higher, the employer's defenses are even more substantially restricted. The availability of compensatory and punitive damages, and jury trials, in such cases would lead a risk averse employer to ensure that its employment practices cannot be challenged on a disparate treatment theory. In other words, the risk averse employer would have strong reasons to avoid any statistical claims that its workforce was in some way "unbalanced."

2. Is direct evidence of discrimination, such as statements by the employer, necessary to prove intentional discrimination, or do these cases more typically turn on circumstantial evidence?

Comment. Individual disparate treatment claims do not require direct proof of intentional discrimination, and in my experience cases involving direct evidence of animus are quite rare. The normal individual treatment claim is based wholly upon circumstantial evidence, and is tried according to a paradigm of proof established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under these standards, a plaintiff seeking to prove disparate treatment initially must show that he or she is a member of a protected group; was qualified for and sought a particular opportunity; was rejected; and that thereafter, the employer continued to seek others for that opportunity. If the plaintiff can meet this initial burden, the employer must articulate a legitimate non-discriminatory reason for the plaintiff's treatment. If the employer does so, the plaintiff then must prove that this reason is a pretext; that is, that it is not the true reason for the employer's action. At no point in this sequence is direct evidence of intentional wrongdoing required.

My experience confirms that the normal individual disparate treatment claim involves just this sequence of circumstantial proof, and does not turn on direct evidence of discrimination. Moreover, I do not believe my experience in this regard is unusual. Title VII has been on the books for 25 years, most employers are aware of their responsibilities under the act, and have trained their supervisors and officials. If direct evidence of animus were required to prove discrimination, we would have far fewer cases in the courts.

I have discussed disparate treatment class actions above, and as I have noted some courts require corroborative evidence to bolster statistical showings in those cases. Once again, however, this does not mean that direct evidence of discrimination is required in such cases. Where the courts do require corroborative or anecdotal evidence to support a class wide disparate treatment claim, they generally do not require direct proof that the employer intentionally discriminated against an individual in the particular fashion alleged in the complaint. Rather, they may allow evidence of global mistreatment against the protected group in question to satisfy the need for corroborative proof. In these cases as well, it is impossible to state that the courts require direct evidence of discrimination.

> 3. Your testimony did not address those provisions of H.R. 1 allowing "grouping" of practices except, apparently, where the court found that the plaintiff could have identified "which specific practice or practices contributed to the disparate impact . . . ." Do you believe that these provisions would pose problems?

Comment. The "particularity" problem with H.R. 1 and its predecessors, noted by many commentators and addressed to some extent in my comments, is a problem of substance. The problem is exemplified in the Wards Cove case itself, in which plaintiffs alleged that the employer's hiring practices, taken as a whole, were unlawful because the result of those practices was an unbalanced workforce. The Court in Wards Cove held that a plaintiff could not engage in a wholesale attack upon an employer's practices, based upon proof that the employer's selection process yielded fewer successful minority candidates than would have been expected given the pool of qualified candidates available. Rather, the Court stated that a plaintiff was obliged to determine which specific employment practice was being challenged.

This step is vital if the Title VII inquiry is not to devolve into a pure search into whether the employer has hired or promoted by the numbers. This is particularly true in cases involving higher level jobs, where a number of subjective factors may contribute to the employer's decisions. If a plaintiff can attack those practices on a "bottom line" basis, the employer's opportunity to defend itself is severely truncated.

Section 4 of this bill, unfortunately, proceeds from the opposite premise than that adopted by the Court in Wards Cove. That is, Section 4 of the bill generally provides that a plaintiff need not specify which one of a group of practices results in a disparate impact. Section 4 does go on to state that this rule shall not apply where a court finds that a plaintiff can identify from records of the respondent reasonably available which specific practice contributed to the disparate impact, and that in such cases the plaintiff must demonstrate which practice contributed to the impact. Nonetheless, the general rule stated by the bill is that the plaintiffs shall not have this burden of proof, absent order of court.

The better rule would be that the plaintiff must bear the burden of demonstrating which practice(s) caused the disparate impact unless relieved of this burden by the court. This is not a semantic distinction. The bill as written would require employers, in order to convince the court that plaintiffs should be required to attack discrete employment practices rather than a group of practices as a whole, to prove that it is possible to parse their employment practices up into discrete elements, and to determine which element(s) cause the disparate impact. In other words, the bill would oblige the employer to prove the plaintiff's prima facie case for it, a situation that hardly can be acceptable. By contrast, a rule that would require the plaintiff to demonstrate which practice he or she wishes to attack, but allowing a court to relieve the plaintiff of the burden to identify which practice is at issue where a group of practices cannot reasonably be parsed into individual elements, preserves the plaintiff's ability to challenge complex employment practices while still adhering to the sound basic principle enunciated by the Court in Wards Cove.

Of course, this problem still arises, and indeed may be more pressing, in disparate treatment class actions. In those cases, it is quite common for plaintiffs to allege that a group of employment practices are administered in a discriminatory fashion. Thus, a plaintiff might allege that an employer's promotion practices, taken as a whole, are discriminatory because they screen out more members of a protected group than whites or males. Similarly, disparate treatment plaintiffs often will rely upon global statistical evidence of an "unbalanced" workforce to bolster their claims of discrimination. The problem of lack of specificity is present in these cases as well, and indeed is more pressing because H.R. 1 would authorize compensatory and punitive damages, and jury trials, in such cases. Moreover, this legislation does not even attempt to deal with this important problem in disparate treatment litigation.

4. Do you believe that the so-called "Shea and Gardner" study on damages under 42 U.S.C. 1981 is a valid predictor of future Title VII litigation if Title VII were to be amended to allow punitive and compensatory damages? If not, why not?

Comment. The "Shea & Gardner" study to which you refer was commissioned by and produced for the National Women's Law Center, and purports to show that in cases arising under 42 U.S.C. Section 1981, courts have not awarded substantial damages. The proponents of H.R. 1 and its predecessors have relied upon this study to claim that allowing compensatory and punitive damages and jury trials under Title VII will make no major change in the law.

In my view, this study is so seriously flawed that it cannot be relied upon by Congress. At the risk of extending my comments unduly, I believe it is important that members of the Committee understand why this study is unreliable and should be disregarded.

First and foremost, the study considers only "reported" cases. What that means is that the authors looked only at Section 1981 cases that have made their way into law books and reporting services. Generally, only 2% of federal cases in fact are "reported", and thus the universe of Section 1981 cases is far greater than that found in the study.

More critically, "reported" cases generally involve issues of law that are deemed significant or novel enough to warrant their publication. Jury verdicts, whether large or small, often are not accompanied by a judge's written opinion, and thus are not the stuff of reported cases. Section 1981 cases that involve "publishable" legal issues might address burdens of proof, statutes of limitations, and other legal issues. But to find out what juries are awarding, a study should be made of jury verdicts, not Section 1981 cases in which significant legal issues have prompted publication in the law books. Reported Section 1981 decisions, in my opinion, are not a reliable indicator of what juries actually are awarding plaintiffs in such cases.

To use an analogy, if a member of Congress wished to know what sentences were being imposed by juries upon those convicted of a specified federal offense, the appropriate place for inquiry would not be a search of reported criminal cases in which a federal judge has written what may be a significant legal opinion on the niceties of the Fourth or Fifth Amendments. Instead, one would search actual jury verdicts to determine what sentences are being imposed. The same principle applies here.

By avoiding actual jury verdicts, the study has missed many significant awards. To cite just one with which I am familiar, in Young v. Von's Markets, an individual racial harassment case arising under Section 1981, a jury awarded $12.1 million in compensatory and punitive damages to the plaintiff.[8] This case was not part of the Shea & Gardner study, although it occurred during the relevant time period, because the verdict did not make it into the category of "reported" cases. If you add this result to the other cases in the Shea & Gardner study, the mathematical average of jury verdicts rises from approximately $50,000 per case to approximately $250,000 per case.

Of course, my point is not that the Shea & Gardner study is accurate including this one additional case. My point is that because the study addresses only a unique portion of the universe of Section 1981 cases that have been decided, it cannot be relied upon as an accurate predictor of what would happen if compensatory and punitive damages, and jury trials, become available under Title VII. In my opinion, the experience of states that allow such damages and jury trials in employment cases -- which was discussed in detail by Pamela Hemmenger and Beverly Burns who testified along with me before the Committee -- is a far more accurate predictor of what Congress could expect if it enacted H.R. 1.

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[8] My law firm handled this case on appeal, and thus I am familiar with the verdict.

Finally, it always has seemed to me that the proponents of this legislation are asking Congress to come to two different conclusions in light of this study. On the one hand, the proponents have argued that enhanced remedies are necessary to interest members of the plaintiffs' bar in litigating employment discrimination cases. Yet at the same time, those same proponents have argued, on the basis of this study, that enhanced remedies actually will not make any significant difference in the amount of relief awarded. Obviously these claims are contradictory, and this inconsistency leads me to conclude that the proponents of this legislation do not really believe in the predictive power of the Shea & Gardner study.

Thank you again for allowing me to make these comments. I hope members of the Committee find them useful.

Very truly yours,

Zachary D. Fasman
of PAUL, HASTINGS, JANOFSKY & WALKER

Anti-Discrimination or Numerical Balancing: Evidence on Quotas under Title VII, 1978-1984

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Anti-Discrimination or Numerical Balancing: Evidence on Quotas under Title VII, 1978-1984

Abstract

The assertion that Title VII of the Civil Rights Act of 1964 has induced quotas implies that employers hiring from the same labor pools should become more like each other in terms of the race and sex of their workforces, as they all seek safety behind the same numbers. The second moment of these distributions provides a test of a law with wide coverage throughout the economy. These tests reveal more complex patterns than the simple quota view allows for. Between 1978 and 1984, the employment distributions of whites have become slightly more concentrated. However, I also observe patterns that are inconsistent with the quota view of Title VII:

(1) The distributions of black females and of non-black minority males and females have become more dispersed.

(2) Dispersion is greater in larger establishments, despite greater exposure to adverse impact claims by virtue of their size.

(3) White dispersion has not fallen significantly faster in larger establishments.

(4) Dispersion is greater in establishments with than without affirmative action.

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Since passage of Title VII of the Civil Rights Act of 1964, it has been illegal for private employers to discriminate on the basis of race, sex, and a number of other categories. Supporters of this legislation typically view discrimination as one of the major factors hindering the economic progress of minorities and females. They see actual and threatened litigation under Title VII as opening up employment opportunities that would otherwise be closed to qualified minorities and women.

To some critics of Title VII and of the proposed Civil Rights Act of 1990, much of whatever progress minorities and women have enjoyed under the statute has come at the cost of the imposition of quotas. Indeed, the major public sticking point to passage of the Civil Rights Act of 1990 (designed to strengthen the 1964 Act in the face of 1989 Supreme Court decisions limiting its force) was the contention that it would inexorably lead to quotas. Rather than promoting race and gender blind policies, these critics see Title VII as embedding race and gender consciousness in employment decisions. As is typical for anti-discrimination policy, the debate has festered without benefit of evidence. Because the intent of the Civil Rights Act of 1990 was to restore discrimination law to its pre-1989 state, we can judge the likelihood of future quotas by examining the pre-1989 record.

A general attack on employee testing has, in the critics' view, hindered the application of merit selection, and contributed to a quota approach. In cases such as Albermarle Paper Co. v. Moody [Supreme Court of the United States, 1975; 422 U.S. 405, 95S.Ct.2362, 45 L.Ed.2d 280], testing for employee selection came under stringent judicial review that for a time resulted in practically unreachable standards. In the aftermath of such litigation, companies have tended to dispense with formal written tests, in many cases replacing them with interviews. Title VII was enacted with the intent of reducing subjective discriminatory employment appraisals. By definition, an objective appraisal of an employee's business merits excludes discrimination. It seems obvious that interviews present far greater opportunities than do written tests for the unrestricted play of subjective judgments. Indeed, Title VII includes in Section 703(h) explicit protection for testing. Surely then it is one of the paradoxes of Title VII that employers have increasingly substituted interviews for tests in employee selection.

Yet interviews or other non-test methods may also be subject to the charge that they have a disparate impact, sorting out a higher proportion of applicants of a particular race or sex. To protect themselves from such charges, some have argued that employers have taken the easy way out and have pursued a policy of numerical balancing, bringing the race and sex composition of their workforces into line with that of the relevant labor pool. Such numerical balancing is argued to proceed despite Section 703(j) of Title VII which restricts Title VII from requiring preferential treatment on account of an imbalance between the composition of a work force and that of the relevant labor pool. The principles of 703(j) have eroded under interpretations such as that in

International Brotherhood of Teamsters v. United States [Supreme Court of the United States, 1977. 431 U.S. 324, 97 S.Ct. 1843, 52L.Ed.2d.396] which allowed liability for discrimination to be established on the basis of numerical imbalance.

This paper examines the impact of Title VII on employment patterns by race and sex in the late 1970s and early 1980s. By this period, Title VII case law has matured and established a number of clear and wide precedents, and employers have had time to respond. The major question to be investigated here is whether Title VII has in fact resulted in numerical balancing. If employers must now wear the straightjacket of quotas, the homogenization of diversity in the workplace should be apparent. Equality of result is, after all, easier to determine than equality of opportunity.

Studies of the impact of anti-discrimination law that compare behavior across companies suffer from the paradoxical problem that the more successful the law is, the less successful it may appear. The most successful laws do not need to be directly enforced to be effective. An effective law is one with strong spill-over effects beyond the companies directly sanctioned, for which the threat of enforcement is sufficient to achieve most of the goals of the law. Where these spill-over effects are strongest, little difference may be observed between those subjected to or free from direct enforcement, because sufficiently strong incentives for compliance are generated by the indirect threat of enforcement. The courts have fashioned many broad precedents in their interpretation of

Title VII of the Civil Rights Act of 1964. The landmark case of Griggs vs. Duke Power [401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971)], for example, affected many employers other than Duke Power. This type of spill-over effect biases against finding any Title VII effect in cross-section studies that compare demographics at firms classified by whether or not they have been directly subject to litigation under Title VII.

An alternative approach is to examine aggregate time-series data. For example, Freeman (1973, 1981) infers the impact of Title VII in part from a comparison of trend rates of growth of black/white earnings ratios before and after 1965. While informative, such studies are subject to criticism. Little detailed information on Title VII enforcement is used, so only a broad-brush interpretation of the largest questions is possible. Doubts may be raised that some other uncontrolled concurrent factor is at work. For example, Smith and Welch (1989) present evidence of the role played by migration and education in narrowing the racial earnings differential, although these do not account for the shift in trends after 1965. Donahue and Heckman (1990) argue for the effectiveness of Title VII, but note that it is difficult to estimate the impact of a law with near uniform applicability, typically forcing researchers to rely on aggregate time-series methods. This paper presents a new approach to measuring the impact of Title VII, that allows for a more fine-grained analysis than does the time-series approach. This new approach gains leverage from the same spill-over effects that obscure cross-section analysis.

Since Griggs, one of the central doctrines established under Title VII is the concept of adverse impact. Prima facie evidence of discrimination may be shown by demonstrating statistical imbalances.[1] Often, the relevant comparison has been between an establishment's demographics and those of the relevant labor market.[2] This creates the often noted and criticized incentive for numerical balancing. A firm can reduce (although not eliminate, as Connecticut v. Teal [457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982)] shows) its risk of adverse impact Title VII litigation by bringing the proportion of minorities and females in its workforce within two or three standard deviations of the mean in the relevant labor market. Numerical balancing will lead to a reduction in the dispersion of minority and female employment shares across employers in the same labor market. Within such markets, as each tries to mirror the labor market, all will come to look more like each other. This reduction in the variance of employment share follows directly from numerical balancing, and is distinct and different from changes induced by shifts in supply or by other shifts in demand. The joint hypothesis to be tested here is that Title VII has been effective, and that this effect has come through the implementation of quotas.

Model

The simplest model of a government that enforces average outcomes on a group of employers is one that taxes or penalizes employers whose demographics depart too far from the mean:

$$T_i = t(P_j - P_{ij}) + e_i \qquad (1)$$

where

P_{ij} is the proportion of employer i's workforce that belongs to a particular race and/or sex,

P_j is the average for employers (drawing from the same labor pool j) used by the government for comparison,

t is a penalty function, imposed by the courts or the regulators,

T_i = total penalty,

e_i = an error term, mean zero.

The hypothesis of numerical balancing implies that T reaches a minimum when

$$P_{ij} = P_j \quad \forall i \epsilon j. \qquad (2)$$

For protected groups favored by the government, T increases as P_{ij} falls below P_j. P_j then is the quota. Any firm seeking only to minimize its expected penalty will set $P_{ij} = P_j$. If this were the only factor at work, all firms in a group would be average. Note there are gains from trade in the labor market even if firms with above average protected group employment do not directly benefit from government action. Below average employers would be willing to bid away their competitors' protected group employees, and would face no employer resistance, until all firms are average.

Operationally, the courts have called for penalties when

$P_j - P_{ij}$ exceeds 2 or 3 standard-deviations.[3] The group average obviously depends upon how the group is defined. This is a major subject of contention in Title VII cases. Attempts to define the relevant labor pool for new hires commonly set boundaries in terms of geographical location and skill class. I shall approximate these by SMSA and industry, on the assumption that whatever the true definition of a labor pool adopted by the courts is, it is likely to be the same (or perceived to be the same) for employers in the same industry and city. Under this formulation, it does not matter if the courts use some P_j different from that specified here. As long as the employers are properly grouped, imposition of *any* common standard reduces variance.

Interviews with officials of both the U.S. Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs reveal that neither agency generally uses the establishment demographic data reported by law as the prime basis for selecting employers for regulatory oversight.

Departures from a world of perfect mediocrity may then arise because (1) productivity differences across groups outweigh expected penalties, (2) employers belong to different groups than those specified, (3) tastes for discrimination outweigh expected penalties, or (4) the government and employers do not operate according to this simple model of numerical balancing, but instead look for more subtle and complex evidence of discrimination.

Changes in Mean Share of Employment

By the simplest measure, employment opportunities have increased for minorities in the late 1970s and early 1980s. This is based on an analysis of changing employment practices at a longitudinal sample of 45217 establishments, employing about 328 people each on average. Together these establishments employed 14.8 million people in 1984. The demographics of these establishments come from self-reports on federal EEO-1 forms legally required for the enforcement of Title VII and affirmative action, which I matched for the years 1978 through 1984. All employers subject to Title VII are required to file such EEO-1 reports. Only establishments reporting more than 50 employers in all years are included in the analysis here.[4]

The sample years studied here were determined by the availability of consistent and high quality data. The end-points represent similar phases of the business cycle, with the civilian unemployment rate at 6.1 percent in 1978 and 7.5 percent in 1984 during recoveries from recessions. While the backbone of adverse-impact law had been in place since the Griggs decision in 1971, discrimination was far from a settled issue during the period examined here. The number of federal employment discrimination cases filed increased from 2109 in 1973 to 8121 in 1986, a substantial and strong upward trend (Donohue and Siegelman, 1989).

Table 1 shows each demographic group's average share of employment in these establishments. The sharpest gains were enjoyed by non-black minority females, from 2.7 to 3.2%, non-black minority males, from 4.0 to 4.7%, and by black females, from 4.8%

to 5.4%. Black males' employment share grew from 5.7 to 5.9%. White females' share rose slightly before dipping slightly below its original 35.6% level. White males were the only group to suffer a marked decline in employment share, 47.2 to 45.2%. By this type of simple measure, minorities have gained employment in EEO reporting firms, as would be expected from effective anti-discrimination policy. By themselves, however, such simple measures cannot isolate the direct role of Title VII, nor can they distinguish whether supply or demand has increased.

The Nature of Changing Employment Patterns

There is considerable diversity in employment patterns across demographic groups. Table 2 shows the correlation matrix of the 1978-1984 change in employment share with the change and with the initial level of employment share. The fall in white male employment share is strongly correlated with gains for all other groups. Some of these correlations must be negative simply because of the adding-up constraint on shares. But an establishment in which one minority group gains is not generally one in which all minority groups gain. For example, black males' employment share increases are practically uncorrelated with those of non-black minority males or females, and are correlated with losses for white females. Minority males gain where white females lose. If employers who were below quota for blacks also tended to be below quota for non-black minorities or for white females, we would expect to see all of these groups gain employment share (at the

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expense of white males) in the establishments under effective quotas. In contrast to this view of quotas, the gains in employment share are uncorrelated or negatively correlated across racial groups.

With the exception of whites, the strongest patterns in Table 2 fall within racial rather than gender lines. The only positive elements in the upper triangle are for male and female blacks and for male and female non-blacks minorities. Where male black employment share has increased, so has that of female blacks. Similarly, among non-black minorities, both male and female shares tend to have grown together. This is as we would expect given the simple fact that men and women of any racial group are clustered in the same geographic areas and the courts apply similar geographic standards to both sexes. In contrast, female job concentration is not so readily apparent. Growth in female job share is either negatively correlated or uncorrelated across racial groups. More is at work here than simple occupational segregation by gender.

Mean reversion is the dominant pattern in the lower panel of Table 2, which correlates the change in employment share between 1978 and 1984 with the initial 1978 share. For all groups, the greatest increase is found in establishments that start with the smallest share, although this correlation is weaker for non-black minorities than for other groups. For whites there is strong evidence that establishments that started with the highest representation levels in 1978 tended to show the sharpest declines in subsequent years.

Measures of Dispersion

As minority representation has increased in the labor force, it has also increased in the firms studied here. In a world of simple numerical balancing, one would have expected the greatest absorption of minorities and females among employers who previously employed few if any. At the same time, numerical balancing distinctively predicts that minorities and females would be bid away from firms "above quota" -- firms employing the greatest proportion of minorities or females. Numerical balancing predicts increasingly concentrated distributions of minority and female employment share. The extremes of zero and of 100 percent white male employment should both become rarer. The increased labor supply of females and non-black minorities would by itself be expected to shift the entire distribution upwards. The distinctive feature of numerical balancing is that it predicts a reduction in the variance. The upper tail of the minority and female distributions should shrink.

Table 3 presents a number of different measures of dispersion of the various demographic groups. At the very least, tokenism is progressing. The proportion of establishments employing at least one minority or female workers increased markedly between 1978 and 1984. In 1978, 45% of the sample establishments employed no non-black minority females, 33% no black females, 37% no non-black minority males, and 24% no black males. By 1984, all these situations had become less prevalent. In 1978, 45 establishments employed only white males. By 1984 only 30 remained. Over the same period, the employment share distributions of both male and female whites became more concentrated. In both cases the standard deviation and the range between the first and third quartile greatly decreased, and the upper tail thinned out.

Among the other groups, no evidence is found to support numerical balancing. For black and other minorities of either sex, the upper tail became more populous. In contrast to the predictions of the numerical balancing model, the proportion of establishments with high minority and female employment share increased. For black females and for non-black minorities, the dispersion of employment share increased.

Shifts in the dispersion of these distributions are in the same direction but small relative to shifts in the means. In consequence, scaling by means tends to reverse the picture drawn above: the coefficient of variation falls for all groups except white males.

Fundamental to all adverse-impact litigation under Title VII is the assumption that random samples drawn from a population will approximate a normal distribution. This follows from the Central Limit Theorem. The normal is typically found to be a useful approximation for samples of 25 or more (Hoel, Port & Stone, 1971, p. 186). We have restricted our study to establishments (samples) of 50 or more. As an empirical matter, the distributions studied here have too many observations at zero and so fail the Bowman-Shenton tests for normality. Even within SMSAs, there are many more establishments employing no blacks, no hispanics, or no females than would be expected in a distribution of randomly drawn samples. Of course, one potential source of non-randomness is discrimination.

Variance Decomposition

The labor pool relevant for any employer depends in part on the employer's location and skill requirements, as Title VII case law recognizes. Employers in the same industry presumably have similar skill requirements, and those in the same city face similar geographically defined labor pools. To a first approximation then, employers in the same industry and city face the same labor pool. Over time, if each employer attempts to match the race and sex composition of this pool, all such employers will come to look more and more alike. The evidence for numerical balancing should be strongest among employers within the same industry and city.

Any variance can be decomposed into within sector (industry or city) and between sector components. This decomposition is given by:

$$\Sigma_i \Sigma_g (x_{ij}-\overline{x})^2 = \Sigma_i \Sigma_g (x_{ig}-\overline{x}_g)^2 + \Sigma_g N_g (\overline{x}_g-\overline{x})^2 \qquad (3)$$

where

x_{ig} = employment share (of given demographic group at establishment i in sector g.

x_g = sector mean

x = overall mean

N_g = number of establishments in sector g.

This identity states that any variance can be given as the sum of two parts: the variance within sectors and the variance across sectors. If Title VII has strongly promoted numerical balancing, this should reveal itself in reductions in the within sector variance, as employers with relatively low representations of minority or female workers hire more.[5]

The importance of variance within sectors relative to between sectors, of course, depends on the number of sectors and how they are defined. In the extreme of one sector, all variation is within. At the opposite extreme of one sector per observation, all variation is between. In the context of Title VII, we can take some guidance from the courts and the EEOC. For jobs making up the bulk of the workforce, workplace demographics are usually compared with a pool of potential employees from a relevant labor market that in practice is identified as the surrounding SMSA. Depending on the level of skill involved, this is sometimes narrowed by the level of education, by occupation or by industry. The employer, as well as the researcher, is faced with ambiguity in the definition of the relevant labor supply. Often this ambiguity is only resolved at the end of lengthy and expensive litigation. Given that neither the employer nor the researcher can know a priori the precise standard to which an employer may be held, and given that any variance decomposition is sensitive to specification, it is prudent to check the results of different plausible specifications. Throughout the following analysis, a maintained assumption is that industry serves as a useful indicator for the skill requirements.

Dispersion within 34 Major SMSAs

The 1970 Census reveals 34 SMSAs with populations of at least one million. Ignoring differences in skill requirements or intra-SMSA location, the brute force application of quotas would lead to a reduction in the variance of employment share across establishments within each of these SMSAs.

For the largest groups, Title VII appears to have been effective. In none of these major cities has the variance of white males employment share shown steady or significant increase. Overall, the variance of white male employment share declined from 3148 in 1978 to 3054 in 1981, wobbled upward a bit during the recession in 1982 and 1983, and fell again to 3062 in 1984[6] (see Table 4). The standard deviation of white male employment fell from .264 in 1978 to .260 in 1984.[7]

There is far more diversity within these cities than between them. About 97% of the total variance is within, rather than between, cities. The within variance has declined from 3083 in 1978 to 2969 in 1984. Employers within these cities became more similar to each other in terms of white male employment over these years.

The decline in white-male variance is significant after 1979. The same holds true for white females, and for black males up to 1983. This is based on an F-test comparing the variance in a given year to that of the same group in 1978.[8] Except for black males' within variance, all of the changes in variances between 1978 and

1984 are significant at the .05 level according to a Levene test.[9] Judging by the declining variance of the employment shares of black males, and of male and female whites, Title VII has been effective. The variances of the two largest groups, male and female whites, have fallen together.

For the smaller groups, black females and other males and females (largely Hispanic), Table 4 shows increasing dispersion in employment share. This increase in variance is not accounted for by the initial integration of segregated employees. Increases in variances are also observed in the subsample of establishments that were integrated in 1978. So far, Title VII has not effectively counter-balanced the compartmentalization of these groups in the work force. Slight variance declines for black males are partially offset by increases for other racial minority groups. This in itself tends to moderate any consequent reduction in white male variance. No evidence of quotas is visible for non-black minorities, or for black females.

The cities themselves are diverging over time in their employment demographics. Every group shows increasing dispersion in employment share across cities. A major force behind this appears to be increasing Hispanic employment share in cities with relatively high initial shares. Because cities differ substantially in their racial composition, effective anti-discrimination policy may increase the variance across cities as employees in each city on average tend to mirror their own city's composition. This affects hiring into occupations that are in local labor markets.[10]

Taking the white-male employment share as a summary measure, the biggest declines in variance occurred in Nassau-Suffolk, Newark, Riverside and Washington, D.C. At the other extreme, the variance increased in Baltimore, Chicago, and Indianapolis.

Dispersion Within Industry

Within industry, the variance of employment share fell for white males and females until 1983, and for black males until 1984 (see Table 5). Establishments within any given industry came to more closely resemble each other over time in terms of black male, or white employment share. This evidence of the effectiveness of Title VII is again balanced by increasing dispersion within industry for black females and other males and females. These groups are clustering more strongly within a subset of firms.

The majority of variation in employment share occurs within rather than across industry, ranging from about 62% for whites up to 97% for non-black minorities. Title VII is expected to break down barriers to minority and female employment in previously white or male industries, so we expect the variance across industries to also decline. This is indeed occurring for male and female whites, and for black males. White females and black males in particular are gaining an increasing presence in industries where they were once scarce.

The continued clustering of black females and of non-black minorities is marked by weak mean reversion at the establishment level and by strong growth in employment share in sectors where this share is initially large. For black females this means increasing concentration in textiles and apparel. For other females -- in apparel, electronics and services. For other males -- in primary and fabricated metals. Title VII presumably can do more to help open doors for these workers in firms and industries where they are still scarce.

A few industries, such as machinery and transportation, showed increasing dispersion of white male employment share, a summary measure. At the other extreme, the service industry showed the largest step toward homogenization.

Industry by SMSA

The closest approximation to the relevant labor pool probably comes from comparing the employment patterns of establishments in the same industry in the same SMSA. Their skill requirements are presumably similar, and they draw from similar geographic areas. Table 6 presents the results of this analysis. The major trends observed classifying by industry are little changed when data is cross-classified by SMSA. Of course, with more categories, more of the variance is now across rather than within groups, ranging from 42% for whites to 15% for blacks. There is still greater variation among firms within than across SMSA-industry categories.

Looking within SMSA and industry, there is no strong evidence of quotas at work. The best case for homogenization under Title VII is that of white-males, who show declining variance in employment-share within industry-SMSA until 1983.[11] This is the only significant decline in dispersion. All of the other demographic groups show increasing or stable variances. The increases in dispersion are significant by the Levene test for black females and for non-black minorities. Numerical balancing does not appear to be operative in the case of female blacks or of non-black minorities. The same law applies to black and non-black minorities. The increased dispersion of non-black minority employment shares is inconsistent with the view of Title VII as a quota system.

Size and the Numbers Game

In adverse impact litigation under Title VII, size is the plaintiff's friend and the defendant's foe. A standard tactic of corporate defense is to draw finer distinctions so as to reduce the size of relevant samples. This is because adverse impact cases turn on statistics, and as sample size decreases standard errors increase and the rejection of any hypothesis, including that of non-discrimination, becomes more difficult.

This introduces an important method of determining the importance of numerical balancing. By virtue of their smallness, small establishments, say those with fewer than 100 employees, are relatively immune from assault under adverse impact models of discrimination. This in turn means they have little additional to gain from numerical balancing. Because their small size inherently tends to protect them from statistical assault, they have less incentive to pursue defensive quotas. Establishment size acts as an instrumental variable here; it is correlated with Title VII pressure but it is unlikely to be correlated with other forces that may have influenced the change over time in the variance of employment demographics. If the use of numerical quotas is an important force in the workplace, it must show itself most strongly in larger establishments that are most vulnerable to adverse impact litigation.

The proportion of white males is falling in both large and small establishments. However, it is falling slightly less in larger ones (by 1.9 percentage points from 1978 to 1984) than in small ones (by 2.2 percentage points). More importantly, the standard-deviation of white male employment share is not lower in large than in small establishments. Among establishments with fewer than 100 employees, this standard-deviation declined from .253 in 1978 to .251 in 1984. Among those with 100 or more employees, this standard-deviation declined from .270 to .265.[12] Table 7 shows demographic variances classified by establishment size. Large establishments have taken marginally greater steps toward homogenization. Contrary to what would be expected if quotas were the dominant response to Title VII pressure, larger establishments are not more homogeneous than small.

Statistical Tests Comparing the Decline in Variance

In addition to knowing whether the variance of white male employment share (for example) has fallen more in large than in small establishments, we would also like to know if the difference between large and small is statistically significant. Formally, we test whether:

$$(s^2_{78}/s^2_t)_L/(s^2_{78}/s^2_t)_s > 1 \tag{4}$$

where: s_t is the sample variance in year t

L indexes large establishments

S indexes small establishments.

Asymptotically, we know that the variance is approximately normally distributed:

$$s^2_t \overset{a}{\to} N(\sigma^2_t, \frac{2\sigma^4_t}{n-1}) \tag{5}$$

Taking logarithms of eq. 4 yields:

$$H = log(s^8_{78})_L - log(s^2_t)_L - log(s^2_{78})_s + log(s^2_t)_s > 0 \tag{6}$$

We need the distribution of this test statistic. By the Delta method we know:

$$log s^2_t \overset{a}{\to} N(log(\sigma^2_t); \frac{2}{n-1}) \tag{7}$$

Assuming the independence of each large and small sample from all others, the test statistic H is asymptotically normally distributed:

$$H \overset{a}{\to} N(log(\sigma^2_{78})_L - log(\sigma^2_t)_L - log(\sigma^2_{78})_s + log(\sigma^2_t)_s), \frac{4}{n_L-1} + \frac{4}{n_s-1}) \tag{8}$$

The hypothesis that variances declined faster in large than in small establishments can then be tested for statistical significance using a T-test.

Table 8 presents the difference between large and small employers of the logarithm of the ratio of variances between 1978 and a given subsequent year (H in eq. 6), along with a one-sided T-statistic for whether variance declined significantly faster in large than in small establishments. The results are mixed in an interesting fashion. For both male and female white employment shares, the variance did not decrease significantly faster in large than in small establishments between 1978 and 1984. Taking white male employment as a summary measure, Title VII has not forced large establishments towards homogeneity faster than it has small establishments less subject to adverse impact claims. On the other hand, by 1984 variance had declined faster in large than in small for black males. For other minorities of either sex and for black females, variances increase in both large and small, but they increase significantly less in large establishments. The same pattern holds for the within-SMSA components of variation. This represents more complex behavior than the simple homogenization of work forces.

White employment has not moved toward homogeneity significantly faster in large than in small establishments, despite the greater threat of adverse impact litigation large establishments face, and contrary to the contention that Title VII has induced quotas.

Given sample sizes of about 20,000, the asymptotic approximation is not troublesome.[13] The log transformation used here yields a distribution that can be more robustly approximated by a normal distribution (Gartside (1972), Layard (1973)).

The assumption of independence of the sub-samples is more usefully open to question. This assumption depends upon employment flows of which we are simply ignorant. For example, we do not know where the additional blacks employed in large and largely white establishments came from. If large employers draw disproportionately from the mean of the small distribution, the small variance will tend to increase as a result. If large employers draw from the tails of the small, the small variance will decline as a result. No evidence on these issues is available, although Smith and Ward (1982, pp. 282-83) present evidence of a net flow of blacks from small employers not covered by Title VII to larger employers subject to Title VII. The same net flow from small to large does not apparently hold for white women.

Affirmative Action

By Executive Order, contractors of the federal government bear the obligation to pursue affirmative action independent of any particular evidence of discrimination. A straightforward test of whether affirmative action has in practice added to pressures for numerical balancing is to see whether the variance of employment shares has declined faster among contractors than non-contractors. The results in Table 9 indicate that except in the case of black females, this has not occurred. To the contrary, variances have generally declined more slowly (or grown more quickly) among contractors than non-contractors.

Statistical tests based on the distribution in eq. 8 indicate that, except for black females, the variance of employment shares did not decline significantly faster in contractor than in non-contractor establishments. This is accounted for by understanding the process used by the Office of Federal Contract Compliance Programs (OFCCP) to enforce affirmative action. Although the government publishes demographic patterns classified by industry and region, Compliance Review Officers tend to ignore this information. Rather than asking how each employer differs from a group average, they ask whether protected group employment shares have increased over time.[14] This regulatory process does not directly induce numerical balancing.

Aggregation Issues

Tests for variance reduction under Title VII depend in somewhat complex ways on the unit of analysis. The issue is whether the level of aggregation used here corresponds to that employed by the courts and the regulatory agencies along a number of dimensions: demographic group, occupation, employer, or industry.

For example, suppose the courts aggregate demographic groups more than I do, by lumping all minorities and females together. This could result in a decline in the variance of white male employment shares (and so in the variance of aggregate minority and female share) even as the variance increased within each minority or female subgroup -- consistent with our observations. The only problem with this interpretation is that this is not how the law is written nor how the courts have interpreted it. An employee belonging to any minority or female sub-group can bring charges under Title VII. No employer has successfully defended against adverse impact claims by, for example, Hispanics by claiming blacks were over-represented. The self-incriminating evidence in support of such a claim would itself be prima facie evidence of discrimination -- in this case in favor of blacks over Hispanics.

A more serious aggregation issue is over-aggregation of industries. Suppose I group as a single industry C what the regulators treat as two distinct industries A and B, with different means. I could then observe a (spurious) increase in the variance of C as all employers within A and B moved closer to their respective means if and only if the spread between these industry means increased at the same time. This follows directly from eq. (3). For the bulk of semi-skilled and unskilled workers studied here, the industry disaggregation used here is more likely too fine than too broad. Moreover, this type of aggregation bias would lead to increasing variances for all demographic groups -- which we do not observe.

The courts do typically disaggregate by occupation or skill class. However, while occupational structure has shown an upward trend toward more skilled employment, the occupational structure within establishments tends to change little over the span of a decade. Again, eq. (3) indicates that overaggregation by occupation could lead to observing an increase in total variance despite a decline in within variance only if the spread between occupation means increased by more than the within occupation decline. And again, such an aggregation bias would affect all demographic groups. Without more complications neither the industry nor the occupation aggregation story can account for the observed patterns of increasing minority and female variance together with declining white male variance.

I examine demographics at the level of the establishment rather than the corporation here. This disaggregation corresponds to the usual pattern in litigation. Skill demands tend to be plant specific, the markets for semi-skilled labor tend to differ by location, personnel decisions are locally implemented, and non-union employees at separate locations often do not coordinate their responses.

Conclusion

One of the major criticisms of Title VII of the Civil Rights Act of 1964 is that it has prompted employers to pursue equality of result rather than equality of opportunity, numerical balancing rather than non-discrimination. Because it may be difficult to prove the business necessity of any employee selection procedure, employers may have an incentive to reduce their exposure to the risk of disparate impact litigation by bringing their workforce race and sex mix into line with that of the relevant labor market. If so, a reasonable method of inferring prima facie evidence of discrimination becomes transformed into simplistic numerical quotas. Employers in the same labor market who adopt this quota mentality will tend to look more and more alike. The numerical balancing model inherent in "quota" criticisms of Title VII carry the clear prediction that the variance of demographic group employment shares across employers within a sector must fall.

The evidence examined here tells a mixed story. For whites, there is some support for numerical balancing. Looking within geographic and industry labor markets between 1978 and 1984, there is evidence of a significant decline in dispersion only in the case of white males. However, for non-black minorities and for black females, the dispersion of employment share across employers increased between 1978 and 1984. More striking, among the larger employers with the most pressure for numerical balancing, the evidence for numerical balancing is no stronger. Nor are employers under the affirmative action obligation more alike than those without the obligation. The fears that a process of blunt court decisions and blunter government and corporate bureaucracy have degraded the fight against discrimination into a simplistic numbers game appear to have weak foundations at best. Employers enjoy great diversity in their workforces, and appear to have found more creative and hopefully deeper methods of attacking discrimination. We are still a long way from every workplace being average.

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Table 1. Mean Employment Share by Demographic Group, 1978-1984
(N = 45217 establishments)

	Percent						
	1978	1979	1980	1981	1982	1983	1984
White Males	47.2	46.3	45.8	45.7	45.6	45.7	45.2
Black Males	5.7	5.8	5.8	5.8	5.7	5.7	5.9
Other Males	4.0	4.2	4.3	4.4	4.5	4.5	4.7
White Females	35.6	35.8	35.9	35.9	35.8	35.7	35.5
Black Females	4.8	5.0	5.1	5.1	5.2	5.2	5.4
Other Females	2.7	2.8	2.9	3.0	3.1	3.2	3.2

Table 2. Correlation of Changes and Initial Levels of Employment Shares

	1978-1984 Change in Employment Share of:					
1978-1984 Change in Employment Share of:	White Males	Black Males	Other Males	White Females	Black Females	Other Females
Black Males	-.21					
Other Males	-.24	-.03				
White Females	-.58	-.28	-.26			
Black Females	-.30	.16	-.06	-.19		
Other Females	-.25	-.06	.22	-.18	-.03	
1978 Employment Share of:						
White Males	-.24	.02	.02	.25	-.02	-.04
Black Males	.06	-.27	.02	.06	-.005*	-.006*
Other Males	.01	-.01*	-.12	.04	-.02	.04
White Females	.17	.07	-.002*	-.26	.07	.04
Black Females	.09	.005*	.004*	-.05	-.11	.03
Other Females	.06	.02	.03	-.05	-.01*	-.08

Note: N = 45217

* not significant at 1% level

Table 3. Changes in Measures of Dispersion by Demographic Groups, 1978-1984 (N = 45217 establishments)

		Standard Deviation	Inter-quartile Range	Coefficient of Variation	Quantiles 5%	Quantiles 95%	% at zero
White Males	1984	.260	.442	.58	.080	.888	0.1
	1978	.264	.452	.56	.083	.902	0.1
Black Males	1984	.093	.066	1.58	0	.247	22.5
	1978	.093	.064	1.63	0	.244	23.6
Other Males	1984	.097	.042	2.06	0	.232	33.2
	1978	.090	.035	2.25	0	.200	36.7
White Females	1984	.253	.420	.71	.033	.811	0.7
	1978	.259	.444	.73	.026	.814	1.0
Black Females	1984	.098	.060	1.81	0	.244	30.3
	1978	.091	.051	1.90	0	.224	32.6
Other Females	1984	.077	.027	2.41	0	.161	40.6
	1978	.069	.020	2.56	0	.130	45.2

Table 4. Variance Decomposition of Employment Shares by Demographic Group, 1978-1984
(34 SMSAs and remainder of country)

	1978	1979	1980	1981	1982	1983	1984
White Males							
Total	3148	3112	3079*	3054*	3060*	3070*	3062*^{L}
Within	3083	3039	2998*	2966*	2968*	2980*	2969*^{L}
Between	65	73	81	88	92	90	93
Black Males							
Total	392	393	389	384*	381*	374*	388^{L}
Within	373	373	368	363*	360*	354*	367*
Between	19	20	21	20	21	20	21
Other Males							
Total	365	390	403	413	414	413	430^{L}
Within	300	318	325	330	328	331	347^{L}
Between	65	72	78	83	85	82	83
White Females							
Total	3022	3000	2972*	2933*	2926*	2905*	2889*^{L}
Within	2952	2922	2891*	2850*	2840*	2823*	2805*^{L}
Between	71	77	81	83	87	82	84
Black Females							
Total	375	392	405	403	413	421	438^{L}
Within	360	376	388	386	394	402	419^{L}
Between	14	16	17	17	18	19	20
Other Females							
Total	215	231	238	244	257	262	269^{L}
Within	189	201	205	212	219	225	231^{L}
Between	26	30	33	36	38	37	38

N = 45217 establishments classified into 34 largest SMSAs and remainder.

Note: Sums may not add because of round-off error.

The SMSAs included are Anaheim, Atlanta, Baltimore, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Columbus, Dallas Ft. Worth, Denver, Detroit, Houston, Indianapolis, Kansas City, Los Angeles, Miami, Milwaukee, Minneapolis St. Paul, Nassau-Suffolk, New Orleans, New York, Newark, Philadelphia, Pittsburgh, Portland, Riverside, St. Louis, San Diego, San Francisco, San Jose, Seattle, Tampa, and Washington, D.C.

* Significantly smaller than 1978 value (.05 level), by F-test.

L Significantly different than 1978 value (.05 level, by Levene test). Tested only in 1984, total and within.
The Levene test is distributed as an F with 1 and 45217 degrees of freedom. The cutoff points for an $F(1,\infty)$ are 6.63 (.01 level) and 3.84 (.05 level).

Table 5. Variance Decomposition of Employment Shares by Demographic Group, 1978-1984
(19 Industries)

	1978	1979	1980	1981	1982	1983	19884
White Males							
Within	1945	1921	1887*	1875*	1864*	1894*	1903*
Between	1203	1192	1192	1178*	1196	1176*	1159*
Black Males							
Within	365	366	363	359*	356*	353*	366
Between	27	27*	26*	25*	24*	22*	21*
Other Males							
Within	354	378	331	400	401	401	418
Between	11	12	13	13	13	11	12
White Females							
Within	1857	1854	1840	1828*	1827*	1853	1871
Between	1166	1145*	1131*	1105*	1099*	1053*	1018*
Black Females							
Within	339	355	367	365	374	383	399
Between	36	37	38	38	39	38	39
Other Females							
Within	208	223	230	240	248	253	260
Between	7	8	8	9	9	9	9

N = 45217 establishments classified into 19 industries as follows: food and tobacco (sic 20,21), textiles (sic 22), apparel (sic 23), lumber and furniture (sic 24, 25), paper (sic 26), printing (sic 27), chemicals, petroleum and rubber (sic 28, 29, 30), primary metals (sic 33), fabricated metals (sic 34), machinery (sic 35), electrical machinery and instruments (sic 36, 38), transportation equipment (sic 37), transportation (sic 400-479), utilities (sic 480-499), wholesale trade (sic 500-519), retail trade (sic 520-599), finance (sic 60-69), services (sic 70-89), and others (sic 10-19, 31, 32, 39).

* Significantly smaller than 1978 value (.05 level), by F-test.

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Table 6. Variance Decomposition of Employment Shares by Demographic Group, 1978-1984
(19 Industries by 35 SMSAs)

	1978	1979	1980	1981	1982	1983	1984
White Males							
Within	1793	1762*	1723*	1708*	1685*	1728*	1736*^{L}
Between	1354	1350	1356	1346	1365	1342	1326*
Black Males							
Within	334	335	330	327*	324*	321*	334
Between	58	58	59	57*	57*	53*	54*
Other Males							
Within	261	277	282	286	287	292	307^{L}
Between	104	113	121	127	127	120	123
White Females							
Within	1669	1659	1638*	1628*	1619*	1649	1666
Between	1354	1341	1333	1306*	1308*	1256*	1222*
Black Females							
Within	315	329	340	338	345	354	369^{L}
Between	60	63	65	66	68	67	70
Other Females							
Within	170	180	183	191	196	203	209^{L}
Between	45	51	55	58	61	59	60

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* Significantly smaller than 1978 value (.05 level), by F-test.

L Significantly different than 1978 value (.05 level), by Levene test. Tested for 1984 within only.

Table 7. The Change in Variance in Large and Small Establishments, 1978-1984
(34 SMSAs and Remainder of Country)

Large Firms		78	79	80	81	82	83	84
WM	T	2016	1984	1957*	1944*	1951*	1956*	1948*
	W	1974	1937	1906*	1888*	1892*	1897*	1888*
	B	42	47	51	56	59	59	60
BM	T	231	229	226*	224*	222*	217*	223*
	W	219	217	213*	211*	209*	205*	211*
	B	12	12	12	12	12	11*	12
OM	T	220	236	241	247	246	245	255
	W	180	192	193	196	195	196	204
	B	40	44	47	50	51	49	50
WF	T	1946	1924	1902*	1887*	1884*	1870*	1861*
	W	1895	1870	1845*	1829*	1824*	1814*	1803*
	B	51	54	57	58	60	57	58
BF	T	253	261	271	268	277	282	290
	W	244	250	260	256	264	269	277
	B	10	11	11	12	13	13	13
OF	T	146	154	158	165	169	172	177
	W	127	133	134	139	142	145	150
	B	19	21	24	26	27	27	27

N = 27664

Small Firms		78	79	80	81	82	83	84
WM	T	1126	1122	1116	1104*	1103*	1109	1109
	W	1099	1092	1082	1067	1066	1073	1072
	B	27	30	34	37	38	36	38
BM	T	161	164	163	160	159	157*	165
	W	153	156	154	151	150	148	155
	B	8	8	9	9	9	9	10
OM	T	145	154	162	166	167	168	175
	W	120	126	131	133	133	134	142
	B	26	28	31	33	34	33	33
WF	T	1077	1076	1070	1046*	1043*	1035*	1028*
	W	1054	1050	1043	1019*	1013*	1007*	1000*
	B	23	26	27	28	29	28	28
BF	T	119	129	132	133	134	137	146
	W	114	124	126	127	137	130	138
	B	5	6	6	6	6	7	7
OF	T	70	77	80	84	88	89	91
	W	62	67	70	72	76	78	80
	B	8	9	10	11	12	11	11

N = 17553

* Significantly smaller than 78 value, by F-test.

Note: Large employ more than 100 employees in each year from 1978 to 1984.
T = Total, W = Within, B = Between, WM =White Male, BM = Black Male, OM = Other Male, F = Female.

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Table 8. Does the Variance Decline Significantly Faster in Large Firms?

		Total Variance		Within Variance	
		Mean	T	Mean	T
WM	79	.013	.67	.013	.67
	80	.021	1.10	.020	1.03
	81	.017	.88	.016	.80
	82	.013	.68	.012	.62
	83	.015	.80	.016	.84
	84	.020	1.03	.020	1.03
BM	79	.030	1.57	.030	1.54
	80	.037	1.94	.036	1.88
	81	.025	1.30	.024	1.26
	82	.028	1.43	.025	1.29
	83	.041	2.13	.034	1.76
	84	.057	2.95	.049	2.53
OM	79	-.014	-.74	-.019	-.96
	80	.016	.86	.016	.82
	81	.018	.91	.018	.96
	82	.024	1.23	.022	1.15
	83	.034	1.78	.032	1.66
	84	.037	1.91	.039	2.04
WF	79	.010	.54	.010	.50
	80	.016	.83	.016	.83
	81	.002	.12	.001	.07
	82	0	.01	-.001	-.07
	83	0	.0	-.002	-.10
	84	-.002	-.11	-.003	-.16
BF	79	.052	2.70	.055	2.86
	80	.032	1.68	.034	1.76
	81	.053	2.76	.056	2.92
	82	.023	1.20	.027	1.91
	83	.031	1.63	.035	1.82
	84	.061	3.16	.062	3.23
OF	79	.040	2.07	.043	2.24
	80	.068	3.51	.074	3.81
	81	.063	3.27	.071	3.69
	82	.084	4.38	.092	4.78
	83	.080	4.17	.096	4.99
	84	.085	4.42	.097	5.03

Note: With an infinite number of degrees of freedom, the .05 significance level for the T-distribution is at 1.645, and the .01 level at 2.326 (one-sided tests). The column labelled mean above reports values of the ratio of logarithmic variance growth rates in large to small samples:

$$(\log s_{78}-\log s_t)_L-(\log s_{78}-\log s_t)_S.$$

Positive values indicate that the variance declines faster (or grows slower) in large than in small establishments.

Table 9. Variance Decomposition of Employment Shares by Demographic Groups, 1978-1984
(34 SMSA's and Remainder of the Country)
Contractors and Non-Contractors Separately

Contractors		78	79	80	81	82	83	84
WM	T	1344	1342	1335	1321	1318	1327	1325
	W	1295	1286	1273	1257*	1251*	1263*	1260*
	B	50	56	62	65	67	64	65
BM	T	197	197	198	196	193	189*	192*
	W	186	186	187	186	182	179*	182
	B	10	11	11	11	10	10*	9*
OM	T	152	161	171	173	176	174	183
	W	124	130	136	137	138	139	149
	B	28	31	35	37	37	35	35
WF	T	1098	1099	1087	1072*	1062*	1063*	1054*
	W	1083	1081	1070	1055*	1045*	1047*	1038*
	B	15	17	18	17	17	16	16
BF	T	132	137	143	141	144	144	149
	W	128	133	138	136	138	139	144
	B	4	4	5	5	5	5	5
OF	T	81	89	91	95	96	97	100
	W	72	78	79	81	83	84	87
	B	9	11	12	13	14	13	13

N = 20789

Non-Contractors		78	79	80	81	82	83	84
WM	T	1558	1536	1517*	1509*	1518*	1521*	1519*
	W	1534	1510	1989*	1978*	1485*	1487*	1480*
	B	23	26	28	32	33	33	35
BM	T	193	194	188*	185*	185*	184*	194
	W	184	184*	178*	175*	175*	173*	187*
	B	9	10	10	10	11	11	12
OM	T	213	229	232	240	238	238	247
	W	176	188	188	193	189	191	197
	B	37	41	44	47	48	47	49
WF	T	1676	1666	1653	1639*	1644	1634*	1632*
	W	1606	1592	1575	1557*	1559*	1551*	1548*
	B	69	75	79	81	85	83	84
BF	T	242	253	260	261	267	275	286
	W	230	240	247	246	252	259	270
	B	12	13	14	14	15	15	16
OF	T	134	141	146	153	160	164	168
	W	117	122	125	130	135	139	143
	B	17	19	21	23	25	24	25

N = 24428
* Significantly smaller than 78 value (.05 level), by F-test.

ENDNOTES

1. Wards Cove Packing Co., Inc. v. Atonio [109 S. Ct. 2115 (1989)] substantially raised the burden for Title VII plaintiffs by requiring in addition that they show that a particular personnel practice or policy causing imbalance is not a business necessity.

2. As Title VII litigation has matured, the focus has (properly) shifted from stock to flow comparisons. Imposition of quotas on flows (hires, discharges, promotions, etc.) will resemble a stock quota in the limit as time passes, and more rapidly the higher the turnover rates (see Leonard, 1982, p. 57).

3. The EEOC recommends use of a 4/5 rule, calling employers practices into question when protected group employment flow rates (promotions, terminations, hires) differ by more than 4/5 that of white males, but in the courts the controlling standard has been the 2 or 3 standard-deviation rule.

4. The size threshold at which EEO reporting is required increased from 25 to 50 in 1983. This leads to oversampling establishments that grew over time, biasing the variance estimates. I include only establishments with more than 50 employees in all years to avoid bias resulting from different selection rules in different years.

5. The initial entry of minorities or women into previously all white male sectors will increase the within sector variance from zero. The variance may also increase if previously all white male employers suddenly and sharply raised minority or female employment share well above the average. But in practice, both of these situations are unusual.

6. Because these variances are cyclically sensitive, it would be useful to observe them over longer time periods to separate cyclic changes from trends.

7. To put this in more accessible terms, this reduction in variance could have been achieved in 1978 by the movement of a minimum of about 52,000 white males from all white male establishments to the mean, assuming all establishments were the mean size. This corresponds to less than one percent of all white males in the sample shifting establishments.

8. The ratio of two sample variances is distributed as an F distribution with 45216 degrees of freedom in the numerator and denominator (Hartley, 1950). The ratio of variances becomes significant when it exceeds 1.0155 with 95% confidence, and 1.0222 with 99% confidence. This is a one-sided test against the null hypothesis that the variance increased for protected groups after 1978. Note that only 5 of the 6 tests reported each year are independent. Because the employment shares sum to one, the

variance of the sixth group is a linear function of the other five.

9. The distributions here fail the Bowman-Shenton tests for normality. There is a bunching of observations at zero. F-tests are not robust to kurtosis or skew. As a check on the F-tests reported above, I compare total and within variances in 1978 and 1984 using a modified Levene (1960) test, proposed by Brown and Forsythe (1974), which Conover, Johnson and Johnson (1971) report to be more robust and powerful than the F-test. Except for black males, all of the changes in total variance from 1978 to 1984 in Table 3 are significant at the .01 level according to this test.

10. By the same token, we would expect a decline in variance across cities for high-level managerial and professional positions that recruit nationally. The lower-skilled occupations that make up the bulk of the labor force and have more localized markets dominate the between city variance for all employees in Table 4.

11. Black males and whites also show reduced dispersion across SMSA-industry lines.

12. This group may be further divided into medium (100 - 499 employees) and large (500+ employees) establishments. The same pattern emerges. The standard deviation of white-male employment share is larger and falls negligibly more in larger establishments, from .276 to .271 between 1978 and 1984, compared to a drop from

.269 to .264 in medium establishments.

13. The approximation of an F-distribution (the ratio of two variances) by a normal distribution is known to be non-robust. Tests for equality of variances are not robust when the normality assumption is violated, when samples are small and/or unequal, and when distributions are skewed or kurtotic (Conover, Johnson and Johnson, 1981).

14. After 1980, affirmative action also ceased to shift the means of the distributions of minorities in contractor compared to non-contractor establishments (Leonard, 1989).

ANALYSIS OF DAMAGE AWARDS UNDER SECTION 1981

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INTRODUCTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). Employees who succeed on a Title VII claim are entitled to equitable relief including back and front pay, reinstatement, instatement, injunctive relief and attorney fees. 42 U.S.C. § 2000e-5(g) and (k). Successful Title VII employees cannot, however, receive compensation for consequential damages for injuries resulting from the discrimination, such as medical expenses, nor are they entitled to punitive damages.

Employees also are protected from intentional employment discrimination on the basis of race under 42 U.S.C. § 1981 (1988). In addition to equitable relief, Section 1981 awards compensatory and punitive damages. Thus, if an employee sues under both Title VII and Section 1981, compensatory and punitive damages would be available. Because, however, Section 1981 does not prohibit employment discrimination on all of the bases protected under Title VII, such as sex, even where an employer intentionally engages in unlawful sex discrimination, an employee is not entitled to compensatory or punitive damages.

In 1990, Congress considered, but ultimately did not pass, legislation entitled "The Civil Rights Act of 1990," S.2140/H.R.4000, 101st Cong., 2d Sess. (1990) (the 1990 Act). The purpose of the 1990 Act was to "amend the Civil Rights Act of 1964 to restore and strengthen civil rights laws that ban discrimination in employment ..." Preamble to the 1990 Act. In Title VII cases involving intentional discrimination, Section 8 of the 1990 Act states that compensatory damages may be awarded and, if an employer engages in an "unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others, punitive damages may be awarded."

Legislation, including a damages provision similar to that in the original version of the 1990 Act, has been introduced in Congress in 1991. See H.R. 1, 102nd Cong., 1st Sess. (1991) (hereinafter "the 1991 Act").

The 1990 and 1991 Civil Rights Acts provide that remedies available to Title VII plaintiffs are equivalent to the remedies which are available to employees who sue under Section 1981. When looking at liability, courts already have held that, "[w]hen 42 U.S.C. §1981 and Title VII are alleged as parallel bases of relief, the same elements of proof are required for both actions." Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231, 1233-34 (5th Cir. 1989). Thus, since the standard for proving intentional discrimination would be the same for Section 1981 and Title VII, by examining damages which have been awarded in Section 1981 employment discrimination cases, it is possible to forecast the types of awards which would be rendered if Congress passes the 1991 Act.

We have reviewed Section 1981 employment discrimination claims reported since January 1, 1980 in West's Federal Reporter and Federal Supplement, BNA's Fair Employment Practice Cases, or in CCH's Employment Practices Decisions. In short, using the Section 1981 experience as a guide our research shows that, if Congress passes the 1991 Act:

(1) Most plaintiffs' claims for damages will fail for procedural or substantive reasons;

(2) Of those plaintiffs who do prevail, many will receive only equitable relief, which currently is available under Title VII;

(3) When a plaintiff does receive compensatory or punitive damages, the award will probably be moderate;

(4) If an employer engages in outrageous intentional discrimination, in a few cases the plaintiff may receive a more substantial compensatory or punitive damages award; and

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(5) If either a jury or court awards excessive compensatory or punitive damages, the award may well be reduced or reversed on appeal.

DISCUSSION

Our research included a total of 594 reported cases decided between 1980 and 1990.[1] Of these cases, 148 apparently settled after the reported decisions, or were reversed or remanded, and no further information was available. In 325 cases, the claims either were dismissed before trial or a court or jury ruled that the plaintiff was not entitled to relief under Section 1981.

In the 121 remaining cases, the plaintiff proved that the employer intentionally engaged in unlawful racial discrimination. In 52 of these cases, however, plaintiffs did not receive any compensatory relief or punitive damages. Rather, the plaintiff received only back pay, front pay or other equitable remedies comparable to those currently available under Title VII. See Appendix B for a list of these cases. In many of these cases, compensatory or punitive damages were not awarded because the court specifically concluded that the remedies afforded under Title VII were sufficient to make the plaintiff whole for the damage suffered. See *e.g.*, *Walsdorf* v. *Board of Commissioners for the East Jefferson Levee District*, 857 F.2d 1047, 1054 (5th Cir. 1988). Thus, because it is likely that Title VII plaintiffs will have experiences similar to Section 1981 plaintiffs, even if the 1991 Act is passed, our research demonstrates that, in a substantial number of cases, courts will continue to award only equitable relief.

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[1] Because we limited our research to reported decisions, this study does not discuss cases that settled without any reported decision.

From 1980 to the present, our research found that plaintiffs were awarded compensatory or punitive damages in 69 cases involving 92 claims.[2] Of the 66 claims where it is possible to determine the exact amount of the award,[3] 42 of the combined compensatory and punitive damages awards were $50,000.00 or less. See Appendix A. In fact, in four cases, plaintiffs received nominal awards of less than $500.00.

Of the cases we reviewed, a plaintiff was ultimately awarded in excess of $200,000.00 in compensatory and/or punitive damages in only three cases. In *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987), the Court of Appeals affirmed the $123,000.00 compensatory damages award noting that the defendant had discriminated against the plaintiff for over ten years, then terminated the plaintiff for "disloyalty" after he filed a discrimination claim with the New Hampshire Commission of Human Rights. 832 F.2d at 197. While the court felt that the punitive damages award needed to be substantial because of Anheuser-Busch's size, it reduced the punitive damage award to $300,000.00 from $3 million. Similarly, the plaintiff in *Mitchell* v. *Keith*, 752 F.2d 385 (9th Cir. 1985), received $500,000.00 punitive damages award against General Motors Corporation (GM). The plaintiff, the first Equal Employment Opportunity Coordinator at one of GM's California plants, was fired solely because of his efforts to protect the rights of minority employees. Finally, in *Holland* v. *First Virginia Banks, Inc.*, 744 F. Supp. 722 (E.D. Va. 1990), a jury awarded the plaintiff $20,000 in compensatory damages and $500,000 in punitive damages against the First Virginia Bank and $1,000 against the individual defendant in a hostile work environment case where the plaintiff was fired after he filed a complaint with the Equal Employment Opportunity Commission.

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[2] Some of the cases had more than one plaintiff.

[3] Because some of the awards combined back pay and compensatory damages and because many of the trials were bifurcated or the damages was calculated later, we were unable to ascertain the amount of damages awarded in all cases.

Our research found five cases over the past ten years where judges or juries awarded substantial compensatory or punitive damages that were later found to be unwarranted. See Appendix C for a list of these cases. On appeal, these awards were either reduced or the entire case was reversed because of the amount of the award. For example, in Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989), the Court of Appeals affirmed the district court's determination that all of the damages awarded by the jury were excessive and that the defendant was entitled to a new trial. While the Court of Appeals affirmed the compensatory damages award in Stephens v. South Atlantic Canner, Inc., 848 F.2d 484 (4th Cir. 1988), it held that the evidence did not support the punitive damages award. See also Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985); Rodgers v. Fisher Body Division, 739 F.2d 1102 (6th Cir. 1984); Rowlett v. Anheuser-Busch Inc., 832 F.2d 194 (1st Cir. 1987). These cases indicate that if a jury or a court awards excessive compensatory or punitive damages, the award can be corrected by a trial or appeals court.[4]

CONCLUSION

Our research demonstrates that, since 1980, victims of intentional employment discrimination have not received excessive damage awards under

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4/ In McKnight v. General Motors Corporation, 705 F. Supp. 464 (E.D. Wis. 1989), the plaintiff was originally awarded $500,000.00 in punitive damages because the defendant fired him after he filed valid racial discrimination complaints. On appeal, the Seventh Circuit Court of Appeals set aside that award on the ground that the Section 1981 claim did not survive the Supreme Court's decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989). McKnight v. General Motors Corporation, 908 F.2d 104 (1990).

42 U.S.C. § 1981. Since courts use the same standards to examine intentional discrimination claims under Section 1981 and Title VII, we believe that the types of relief afforded in Section 1981 claims accurately reflect relief that would be awarded under the Civil Rights Act of 1991. Using the Section 1981 experience as a guide, our research shows that, if Congress passes the 1991 Act, most plaintiffs will receive neither compensatory nor punitive damages. Even if an employee proves that the employer engaged in intentional discrimination, unless an employer has engaged in outrageous, intentional conduct, compensatory and punitive damages awards will be moderate. Finally, if a judge or jury awards "excessive" damages, the award will be modified by another court.

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APPENDIX A

Section 1981 Cases In Which Compensatory and/or Punitive Damages Were Awarded: 1980-Present

Total = 44

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
7/20/90	Holland v. First Virginia Banks, Inc., 744 F. Supp. 722 (E.D. Va. 1990)			$20,000.00	$301,000.00	
4/16/90	Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990)			$10,000.00		$1 (nominal damages); $18,562.50 (attorneys' fees); $2,189.00 (costs)
11/21/89	Jackson v. City of Albuquerque, 890 F.2d 225 (10th Cir. 1989)	Amount not reported	$50,[illegible]	$70,000.00	$70,000.00	Reinstatement
7/14/89	Gillespie v. First Interstate Bank of Wisconsin Southeast, 717 F. Supp. 649 (E.D. Wis. 1989)	$20,934.92 (plus prejudgment interest)		$50,000.00	$60,000.00 (district court reduced jury award of $100,000.00 as excessive)	
7/13/89	Flanagan v. Aaron E. Henry Community Health Services Center, 876 F.2d 1231 (5th Cir. 1989)			$30,000.00	$25,000.00	
6/3/89	[illegible] v. Kroger Co., 51 FEP Cases 195 (S.D. Ga. 1989)	$1,731.00		$7,200.00		
3/16/89	Johnson v. Philadelphia Electric Co., 709 F. Supp. 98 (E.D. Pa. 1989)	Amount not reported	Amount not reported	$10,000.00		
2/28/89	Jackson v. Pool Mortgage Company, 868 F.2d 1178 (10th Cir. 1989)	$49,725.00		$24,421.00		
2/2/89	[illegible] v. Euclid Manor Nursing Home, 867 F.2d 291 (6th Cir. 1989)					$100.00

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Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/30/88	*Carter* v. *Sedgwick County, Kansas*, 705 F. Supp. 1474 (D. Kan. 1988)	$10,748.05	Yes or reinstatement	$100,000.00	$10,000.00	
11/25/88	*Krebia* v. *Crysler Plastic Products Corp.*, 863 F.2d 47 (table) (6th Cir. 1988) (*Krebia* II)	$1.00		$75,000.00	$55,000.00	Reversed to resolve issue of reinstatement
9/2/88	*Edwards* v. *Jewish Hospital of St. Louis*, 855 F.2d 1345 (8th Cir. 1988)			$1.00	$25,000.00	
7/22/88	*Cowan* v. *Prudential Insurance Co. of America*, 852 F.2d 688 (2d Cir. 1988)			$15,000.00		
6/7/88	*Hernandez* v. *Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139 (5th Cir. 1988)			$5,000.00		
5/25/88	*Fox* v. *Yellow Freight System, Inc.*, 845 F.2d 122 (6th Cir. 1988)			$10,000.00	$5,000.00	
4/12/88	*Zaklama* v. *Mt. Sinai Medical Center*, 842 F.2d 291 (11th Cir. 1988)			$81,000.00	$50,000.00	
4/11/88	*Wade* v. *Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988)	$2,100.00		$50,000.00		"Out-of-pocket-loss" $2,000.00
12/8/87	*Reeder-Baker* v. *Lincoln National Corporation*, 834 F.2d 1373 (7th Cir. 1987)	$23,665.49	$26,760.00	$10,000.00	$25,000.00	Prejudgment interest - $1,063.76
9/30/87	*Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987)	$176,000.00	-	$123,000.00	$300,000.00 (First Circuit reduced jury award of $3 million as excessive)	

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/11/87	Collins v. Illinois, 830 F.2d 692 (7th Cir. 1987)			Remanded to acertain the amount		
8/24/87	Richards v. New York City Board of Education, 668 F. Supp. 259 (S.D.N.Y. 1987), aff'd w/out opinion, 842 F.2d 1289 (2d Cir. 1988)	Not reported		$15,000.00		Promotion to next available position of commensurate responsibility and pay
8/13/87	Marsh v. Digital Equipment Corp., 675 F. Supp. 1186 (D. Ariz. 1987)	$34,642.45 (plus prejudgment interest)		$15,000.00	$50,000.00	
5/20/87	Wyatt v. Security Inn Food & Beverage, Inc., 819 F.2d 69 (4th Cir. 1987) [three plaintiffs]			$1.00 $1.00 $1.00	$15,000.00 $15,000.00 $15,000.00	
5/4/87	Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987)	$130,000.00 (May include future earnings)		$20,000.00	$100,000.00	
4/2/87	Johnson v. Armored Transport of California, Inc., 813 F.2d 1041 (9th Cir. 1987)			$45,000.00	$150,000.00 (plaintiff agreed to reduce jury award from $250,000.00 rather than face a new trial)	
1/26/87	Brown v. Freedman Baking Co., 810 F.2d 6 (1st Cir. 1987) [three plaintiffs]	$22,000.00 $ 4,000.00 $ 1,000.00			$53,000.00 $54,000.00 $54,000.00	
11/10/86	Walters v. City of Atlanta, 803 F.2d 1135 (11th Cir. 1986)			$150,000.00	$2,000.00	Instatement

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Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
7/30/86	Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986)	Amount not reported		$25,000.00	$25,000.00	
6/16/86	Byrd v. SCM Allied Paper Co., 42 FEP Cases 1643 (N.D. Ind. 1986)	$17,615.34	(To be paid if immediate reinstatement impossible)	$5,000.00		Reinstatement; $3,226.19 (prejudgment interest)
6/9/86	Wilmington v. J.I. Case Co., 793 F.2d 909 (8th Cir. 1986)	Jury awarded $400,000.00 in "actual damages" to include back pay, future earnings and emotional distress			$40,000.00	Future earnings
4/23/86	Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508 (7th Cir. 1986)			$29,500.00 (May include back pay)	$7,500.00	
12/11/85	Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985)			$100,000.00	$1,000.00	
10/23/85	Anderson v. Group Hospitalization, Inc., 621 F. Supp. 943 (D.D.C. 1985), aff'd in relevant part, 820 F.2d 465 (D.C. Cir. 1987)			$100,000.00 (includes back pay)		Reinstatement; injunction against further discrimination.
10/21/85	Moffett v. Gene B. Glick Co., 621 F. Supp. 244 (N.D. Ind. 1985)	$10,895.00		$66,640.00	$15,000.00	Corporate defendant entitled to $30,000.00 credit which represents settlement amount with individual defendants; $1,275.24 (interest)

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Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/17/85	Foster v. MCI Telecommunications Corp., 773 F.2d 1116 (10th Cir. 1985)	Amount not reported		$50,000.00		
8/30/85	Ramsey v. American Air Filter Co., Inc., 772 F.2d 1303 (7th Cir. 1985)	$37,486.00		$35,000.00 (Seventh Circuit reduced award from $75,000.00)	$20,000.00 (Seventh Circuit reduced award from $150,000)	
7/9/85	Rosamond v. Cooper Industrial Products, 612 F. Supp. 1105 N.D. Ind. 1985)	$8,550.02		$500.00		Employment records expunged
6/7/85	Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985) (Erebia I)			Nominal ($10,000.00 award vacated.)	$30,000.00	
6/6/85	Alston v. Blue Cross, 37 FEP Cases 1792 (E.D.N.Y. 1985)	$17,422.00 (includes prejudgment interest)	$36,658.00 (includes prejudgment interest)	$90,000.00		
4/16/85	Grubb v. W.A. Foote Memorial Hosp., Inc., 759 F.2d 546 (6th Cir. 1985)	$57,689.60	Amount not reported	$25,000.00		$1,560.00 (out-of-pocket expenses); $19,758.59 (Interest); Reinstatement
3/22/85	Easley v. Anheuser-Busch, Inc., 758 F.2d 251 (8th Cir. 1985) [three plaintiffs]	Amount not reported		$500.00		
1/21/85	Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985)	$30,000.00		$20,000.00	$500,000.00	
10/4/84	Easley v. Northern Shipping Co., 597 F. Supp. 954 (E.D. Pa. 1984)	$2,862.70		$1.00		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
9/27/84	Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984)			$10,000.00		
7/13/84	Rodgers v. Fisher Body Div., 739 F.2d 1102 (6th Cir. 1984)			(Sixth Circuit vacated $300,000.00 award as excessive)	(Sixth Circuit vacated $300,000.00 award as excessive)	
6/27/84	Pauley v. City of Anadarko, Okl., 738 F.2d 364 (10th Cir. 1984)					Actual damages - $10,000.00 (This amount may include back pay)
5/2/84	EEOC v. Gaddis, 733 F.2d 1373 (10th Cir. 1984)			$18,225.00 (This amount includes back pay & punitive damages)		
4/18/84	Dickerson v. City Bank & Trust Co., 46 FEP Cases (1313 (D. Kan. 1984)			$2,145.00 (may include back pay)	$10,000.00	
4/5/84	EEOC v. Inland Marine Industries, 729 F.2d 1229 (9th Cir. 1984)	$268.85		$500.00		
2/21/84	Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984)	$72,355.20		$52,644.80		
2/17/84	Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984)			$10,000.00 (This amount includes back pay)		
1/9/94	Gates v. ITT Continental Baking Co., 581 F. Supp. 204 (N.D. Ohio 1984)	$51,877.00		$35,000.00		Reinstatement; fringe benefits

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Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
10/28/83	*Poindexter* v. *Kansas City, Missouri Water Dept.*, 573 F. Supp. 647 (W.D. Mo. 1983), *aff'd w/out opinion*, 734 F.2d 377 (8th Cir. 1984)	Amount not reported		Amount not reported	Amount not reported	
8/26/83	*Goldsmith* v. *E.I. du Pont de Nemours & Co.*, 571 F. Supp. 235 (D. Del. 1983)			$10,000.00		
8/22/83	*Jackson* v. *Wakulla Springs & Lodge*, 33 FEP Cases 1301 (N.D. Fla. 1983) [five plaintiffs]	$14,719.90 $10,854.00 $14,070.00 $ 7,822.55 $ 4,786.80		$3,000.00 $5,000.00 $3,000.00 $3,000.00 $5,000.00	$5,000.00 $5,000.00 $5,000.00 $5,000.00 $5,000.00	
7/19/83	*Block* v. *R.H. Macy & Co.*, 712 F.2d 1241 (8th Cir. 1983)	$7,598.00		$12,402.00	$60,000.00	
11/22/82	*Cooper* v. *Department of Administration, State of Nevada*, 558 F. Supp. 244 (D. Nev. 1982)			$10,000.00		
9/23/82	*Irving* v. *Dubuque Packing Co.*, 689 F.2d 170 (10th Cir. 1982)			$20,000.00		
5/28/82	*Metrocare* v. *Washington Metropolitan Area Transit Authority*, 679 F.2d 922 (D.C. Cir. 1982) [four plaintiffs]	Amount not reported (District of Columbia Circuit reinstated unspecified jury verdicts for four individual plaintiffs)		Amount not reported		

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
11/20/81	Amon v. Wade, 28 FEP Cases 1043 (C.D. Ga. 1981) [seven plaintiffs]			Amount not reported		
11/19/81	Acosta v. University of the District of Columbia, 528 F. Supp. 1215 (D.D.C. 1981)			$7,500.00 (may include back or front pay)		
10/2/81	Williams v. Trans World Airlines, 660 F.2d 1267 (8th Cir. 1981)			Amount not reported	Reinstatement	
9/30/81	Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981) [three plaintiffs]			$15,030.00 $ 3,550.00		
6/17/81	Lehman v. Yellow Freight Systems, Inc., 651 F.2d 520 (7th Cir. 1981)			Amount not reported	Reinstatement; retroactive seniority	
5/31/81	Reese v. Batesville Casket Co., 25 FEP Cases 1672 (D.D.C. 1981) [two plaintiffs]			$240,000.00 (includes loss of future earings) $60,000.00		
3/26/81	Richardson v. Restaurant Marketing Associates, 527 F. Supp. 690 (N.D. Cal. 1981) [two plaintiffs]	Amount not reported		$10,000.00 $10,000.00		
12/5/80	Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341 (8th Cir. 1980) [class action]			$16,854.00		
8/18/80	Fisher v. Dillard University, 499 F. Supp. 525 (E.D. La. 1980)	$11,127.00 (plus pre-judgment interest)		$50,000.00	$10,000.00	

Date Case Decided	Name of Case	Back Pay	Front Pay	Compensatory	Punitive	Additional
2/25/80	Crawford v. Roadway Express, Inc., 485 F. Supp. 914 (N.D. Ga. 1980)	$17,015.55		$26,793.00		

APPENDIX B

Cases Where Plaintiff Prevailed on Section 1981 Claim But Neither Compensatory Nor Punitive Damages Were Awarded

Total = 52

Abron v. *Black & Decker (US) Inc.*, 654 F.2d 951 (4th Cir. 1981)

Albright v. *Longview Police Dept.*, 884 F.2d 835 (5th Cir. 1989)

Bennun v. *Rutgers*, 737 F. Supp. 1393 (D.N.J. 1990)

Berger v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, *supplemented by*, 852 F.2d 621 (D.C. Cir. 1988)

Brady v. *Thurston Motor Lines, Inc.*, 753 F.2d 1269 (4th Cir. 1985)

Bridgeport Guardians, Inc. v. *Delmonte*, 553 F. Supp. 601 (D. Conn. 1982)

Briseno v. *Central Technical Community College Area*, 739 F.2d 344 (8th Cir. 1984)

Brown v. *Eckerd Drugs, Inc.*, 564 F. Supp. 1440 (D. N.C. 1983)

Bunch v. *Bullard*, 795 F.2d 384 (5th Cir. 1986)

Calloway v. *Westinghouse Electric Corp.*, 642 F. Supp. 663 (M.D. Ga. 1986)

Cunico v. *Pueblo School Dist. No. 60*, 693 F. Supp. 954, *supplemented by* 705 F.Supp. 1466 (D. Colo. 1988)

Dacus v. *Southern College of Optometry*, 657 F.2d 81 (6th Cir. 1981)

Dougherty v. *Barry*, 869 F.2d 605 (D.C. Cir. 1989)

Eddins v. *West Georgia Medical Center, Inc.*, 629 F. Supp. 753, *supplemented by*, 39 F.E.P.C. 1499 (N.D. Ga. 1985), *aff'd in part without opinion*, 795 F.2d 88 (11th Cir. 1986)

Figgs v. *Quick Fill Corp.*, 766 F.2d 901 (5th Cir. 1985)

Freeman v. *Michigan Dept. of State*, 808 F.2d 1174 (6th Cir. 1987)

Freeman v. *Motor Convoy, Inc.*, 700 F.2d 1339 (11th Cir. 1983)

Gilbert v. *City of Little Rock*, 867 F.2d 1063 (8th Cir. 1989)

Goodlett v. *Rhodes Furniture Co.*, 26 F.E.P.C. 1400 (N.D. Ga. 1981)

Grant v. *Bethlehem Steel Corp.*, 622 F.2d 43 (2d Cir. 1980)

Gunby v. *Pennsylvania Elec. Co.*, 840 F.2d 1108 (3d Cir. 1988)

Hameed v. *International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506 (8th Cir. 1980)

Hamilton v. *Rodgers*, 791 F.2d 439 (5th Cir. 1986)

Harris v. *Richards Mfg. Co.*, 675 F.2d 811 (6th Cir. 1982)

Haynes v. *Miller*, 669 F.2d 1125 (6th Cir. 1982)

Heard v. *Golden Flake Snack Foods, Inc.*, 652 F. Supp. 282 (N.D. Ala. 1986), *aff'd without opinion*, 834 F.2d 1027 (11th Cir. 1987)

Jackson v. *McCleod*, 748 F. Supp. 831 (S.D. Ala. 1990)

Jackson v. *Missouri Pacific R. Co.*, 803 F.2d 401 (8th Cir. 1986)

Johnson v. *Chapel Hill Independent School Dist.*, 853 F.2d 375 (5th Cir. 1988)

Lilly v. *Harris-Teeter Supermarket*, 842 F.2d 1496 (4th Cir. 1988)

Louisville Black Police Officers Org. v. *City of Louisville*, 700 F.2d 268 (6th Cir. 1983)

Marks v. *Prattco, Inc.*, 633 F.2d 1122 (5th Cir. 1981)

McAlester v. *United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988)

Mitchell v. *OsAir, Inc.*, 629 F. Supp. 636 (N.D. Ohio 1986)

N.A.A.C.P. v. *City of Evergreen, Ala.*, 693 F.2d 1367 (11th Cir. 1982)

Padilla v. *United Air lines*, 716 F. Supp. 485 (D. Colo. 1989)

Payne v. *Travenol Labs., Inc.*, 673 F.2d 798 (5th Cir. 1982)

Roman v. *Niagara Frontier Transit Metro System, Inc.*, 30 F.E.P.C. 1345 (D. Colo. 1983)

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Royal v. Bethelehem Steel Corp., 636 F. Supp. 833 (E.D. Tex. 1986)

Satterwhite v. Smith, 744 F.2d 1380 (9th Cir. 1984)

Savage v. McAvoy, 26 F.E.P.C. 114 (S.D. Ohio 1980)

Scroggins v. Kansas, 802 F.2d 1289 (10th Cir. 1986)

Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988)

Smith v. American Service Co. of Atlanta, Inc., 611 F. Supp. 321 (N.D. Ga. 1984)

Spiva v. Copperweld Steel Co., 22 F.E.P.C. 900 (N.D. Ohio 1980)

Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981)

Walsdorf v. Board of Commissioners for the East Jefferson Levee District, 857 F.2d 1047 (5th Cir. 1988)

Weatherspoon v. Andrews & Co., 32 F.E.P.C. 1226 (D. Colo. 1983)

Whatley v. Skaggs Companies, Inc., 707 F.2d 1129 (10th Cir. 1983)

Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980)

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982)

Wilmington Firefighters Local 1590 v. City of Wilmington, 40 E.P.D. ¶ 36, 361 (D. Del. 1986)

APPENDIX C

Cases Where Section 1981 Damages Were Reversed as Excessive Total = 5

Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985)	Court of appeals reduced $75,000.00 compensatory damage award to $35,000.00 and reduced $150,000.00 punitive damage award to $20,000.00.
Rodgers v. Fisher Body Division, 739 F.2d 1102 (6th Cir. 1984)	Court of appeals remanded for trial solely on the issue of damages. The jury originally awarded $300,000.00 in compensatory damages and $500,000.00 in punitive damages.
Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987)	Court of appeals affirmed $123,000.00 award for emotional distress but reduced the $3 million punitive damage award to $300,000.00.
Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503 (11th Cir. 1989)	Court of appeals remanded for a new trial because it found the following awards to be excessive: the jury award of $42,000.00 in back pay; $500,000.00 in front pay; and, $2.5 million punitive damage award.
Stephens v. South Atlantic Canners, Inc., 848 F.2d 484 (4th Cir. 1988)	Court of appeals remanded for a new trial. The jury originally awarded $100,000.00 in compensatory damages and $85,000.00 in punitive damages.

APPENDIX D

Summary of Cases Researched

Total Number of Cases Researched:	594
Total Number of Cases In Which 1981 Claim Was Dismissed or Plaintiff Lost at Trial:	325
Total Number of Cases Where the Disposition is Unknown:	148
Total Number of Cases Where Plaintiff Proved Intentional Discrimination:	121
Total Number of Cases Where Plaintiff Recovered Only Equitable Relief:	52
Total Number of Cases Where Plaintiff Received Compensatory Relief or Punitive Damanges:	69

THE *PRICE WATERHOUSE*-
REVERSAL PROVISIONS
OF THE CIVIL RIGHTS ACT
OF 1990:

JEOPARDIZING AFFIRMATIVE
ACTION TO PUNISH MOTIVES
WITHOUT CONSEQUENCES

nfs ep

National Foundation for the Study of Employment Policy

POLICY PAPER

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INTRODUCTION AND EXECUTIVE SUMMARY

In the debates surrounding the proposed Civil Rights Act of 1990 (S.2104/H.R.4000), relatively little attention has been paid to Section 5 of the bill, the section designed to reverse the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989). That section deserves careful scrutiny, however, for two major reasons:

First, if enacted in its present form, Section 5 could jeopardize voluntary affirmative action as it is practiced by many large employers today.

Second, Section 5 would not just reverse a 1989 Supreme Court decision; it would eliminate a traditional element of civil liability — proof of causation — by imposing liability on employers despite proof that an improper motive had made no difference in the outcome of an employment decision.

Potential Effect on Affirmative Action. Current law allows employers to use race or sex as one factor in choosing among qualified job candidates to meet affirmative action goals. Section 5 of the proposed Civil Rights bill, however, would outlaw any employment decision motivated even in part by considerations of race or sex, regardless of any legitimate reasons the employer might have. Thus, the section could be read to rule out even benign uses of preference to achieve affirmative action goals. Whether a purported "savings clause" found elsewhere in the bill (Section 13) would be sufficient to avoid this result is questionable, at best.

Effects on Title VII Theory and Practice. The Civil Rights bill is being promoted by its sponsors as legislation to overturn a series of "Reagan Court" decisions issued last term that they say "set back the clock" on civil rights. But *Price Waterhouse* is no such decision. The Court's main opinion in that case was written, not by any of the Reagan appointees, but by Justice Brennan. Justices Marshall, Blackmun and Stevens joined in the opinion. The decision has been recognized by most legal scholars as quite favorable to civil rights plaintiffs.

In any event, Section 5 of the Civil Rights bill would not simply reverse *Price Waterhouse*; it would cast out a long and consistent line of judicial precedents dealing with "mixed motive" employment decisions. Indeed, Justice Brennan described the approach the Court took in *Price Waterhouse* as following a "well-worn path." 109 S.Ct at 1790.

The bill would depart from that path and enlarge the class of persons entitled to legal remedies under Title VII of the Civil Rights Act of 1964. Under Section 5, any time a manager or supervisor took a biased consideration into account in making an employment decision, the employer would be in violation of Title VII and anyone affected by the decision would be entitled to legal remedies, even if there were proof that the improper motive had no causal affect on the decision, because the employer also had a perfectly legitimate reason for which it would have made the same decision anyway.

Example: Suppose a bank manager catches a teller robbing the till and fires him. The teller sues the bank under Title VII, claiming racial discrimination. At trial, the teller proves that the manager who made the decision was biased against members of the teller's race and that this bias entered into the manager's thinking when he fired the teller. The bank, however, proves that it would have fired any teller caught stealing, regardless of race.

Under current law, as reaffirmed by the Supreme Court in *Price Waterhouse*, the bank's proof that it would have fired the teller even in the absence of any racial factor would be a valid defense, and the case would be dismissed.

Under Section 5 of the bill, however, the bank in this example would be in violation of Title VII and would be subject to costly penalties. The proof that the teller was a thief would be no defense; however, the bank could use it to resist being ordered to reinstate the teller or provide back pay. But the bank would be subject, at a minimum, to a "cease and desist" order. It would also have to pay the discharged teller's attorney's fees and court costs, as well as its own.

By thus imposing liability based solely on the presence in a supervisor's mind of an improper motive that made no difference to the outcome of an employment decision, the legislation would, in effect, establish a concept akin to "thought crime" under Title VII.

Importantly, too, under another section of the bill (Section 8), if a jury found that the violation had caused the "victim" of the incident (meaning the discharged thief in our example) mental anguish or distress, it could also award "compensatory" and conceivably even punitive damages.

Purpose of Policy Paper. The bill's sponsors have not made it clear why they think the law should concern itself with a biased motive in the mind of a manager that has made no difference to any action taken in the real world. Nor have they explained why our courts should be required to provide legal remedies to persons who have been treated no differently than they would have been treated in the absence of any discrimination.

This policy paper takes a close look at the *Price Waterhouse* decision (pp. 3-6 below) and at Section 5 of the proposed Civil Rights Act of 1990 (pp.6-7). It examines the bill's implications for affirmative action (pp. 7-8) and for Title VII theory and practice (pp. 9-10).

The purpose of the paper is to ensure that the practical implications of Section 5 are not misunderstood or simply overlooked in the face of the controversy stirred by other provisions of the legislation. In analyzing this one section in some detail, the paper also aims to shed more light on the arguments of the bill's proponents that their objective throughout the legislation is simply to "restore" the law to where it was before last year's Supreme Court decisions.

Background — The Price Waterhouse Case

Initially, many observers were quite surprised that the sponsors of the Civil Rights bill included *Price Waterhouse* on the list of Supreme Court decisions they would ask Congress to overturn. After all, as noted above, the lead opinion in the case was written by Justice William Brennan, Jr., and joined by the other mainstays of the Court's liberal wing. Moreover, the decision has generally been regarded as favorable to Civil Rights plaintiffs, in that it imposes a more stringent burden of proof on employers.

For example, Charles A. Shanor, professor of law at Emory University and outgoing General Counsel of the U.S. Equal Employment Opportunity Commission, has commented that "[m]ost analysts agree that the disparate treatment theory took a pro-plaintiff turn in *Price Waterhouse* . . . ." Shanor and Marcosson, "Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988-89," 6 *The Labor Lawyer* 145, 147 (1990).

Likewise, Theodore St. Antoine, professor of law at the University of Michigan, describes the decision as "a striking demonstration that [the Supreme Court] is not the implacable nemesis of employee rights that some critics would have it." St. Antoine, "Major Labor and Employment Decisions of the Supreme Court 1988-89 Term" at 18.

Why, then, does this decision require legislative reversal? An analysis of the decision and of the subsequent history of the case suggests no convincing answer.

1. The Facts

Ann Hopkins sued Price Waterhouse alleging sex discrimination after she was considered for, but not granted, partnership in the accounting firm. The trial judge found that stereotyped attitudes about the "proper behavior of women" had entered into the thinking of at least some of the partners who reviewed her candidacy. But the judge was also convinced by evidence that Hopkins was "harsh, difficult to work with and impatient with staff," 109 S. Ct. at 1782, and that the firm's decision not to grant her partnership was based at least in part on legitimate concerns about her lack of "interpersonal skills." Moreover, the judge found that the firm had *not* fabricated these concerns as a pretext for discrimination or given them decisive emphasis just because Hopkins was a woman. *Id.* at 1783.

2. The Supreme Court's Holding

The Supreme Court ultimately reviewed the case to resolve "the respective burdens of proof of a defendant and a plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives." Id. at 1781. After discussing in depth the legal issues unique to cases involving "mixed motive" employment decisions, Justice Brennan summarized the Court's holding as follows:

> We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, *the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.*

109 S. Ct. at 1787-88 (emphasis added).

Six justices supported this formulation, although there was some disagreement among them about precisely what sort of evidence an employer would need to present to satisfy its rebuttal burden in such a case (whether, for example, the employer's evidence must be "objective").

The more conservative justices dissented. In an opinion written by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Scalia, they concluded that there was no justification for imposing a heavier burden on employers in "mixed motive" cases than in other disparate treatment cases.

3. Significance

Three things are significant about the Supreme Court's holding in *Price Waterhouse.* First, it unquestionably makes the employer's rebuttal burden more stringent in a "mixed motive" situation than in most ordinary cases in which intentional discrimination is alleged. In the ordinary case, once a plaintiff made a prima facie showing of intentional discrimination, the employer's burden is simply to "articulate a legitimate, nondiscriminatory reason" for its decision. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981). The burden of persuasion ordinarily stays with the plaintiff throughout the proceeding, just as it does in most ordinary civil litigation. Under *Price Waterhouse,* however, that burden shifts and the employer is faced with the difficult task of proving a negative — i.e., that its decision would not have been different in the absence of any biased consideration.

The second significant point is that, in holding that Title VII imposes this heightened rebuttal burden on employers in "mixed motive" cases, the Court was following established principles of employment law that the federal courts and enforcement agencies have developed painstakingly over many years. Justice Brennan noted that the burden of proof formulation announced in *Price Waterhouse* was precisely the same as that applied by the

Court in its unanimous decision in *Mt. Healthy School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977). In that case, a teacher alleged he had been discharged for exercising free speech rights protected by the First Amendment, but the Court held that such an employee "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." 429 U.S. at 286.

Justice Brennan also noted that his *Price Waterhouse* formulation is fully consistent with *NLRB v. Transportation Management*, 462 U.S. 393 (1983), in which the Court upheld the National Labor Relations Board's "identical" approach to dealing with "mixed motive" issues under Section 8(a)(3) of the NLRA, which bans discrimination based on union membership or activity. Summing up, Justice Brennan wrote:

> We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path. 109 S. Ct. at 1790.

The third point that needs to be understood is that the *Price Waterhouse* burden of proof formulation does not allow employers readily to escape liability for employment decisions that have been influenced by race or gender bias. The best illustration is the *Price Waterhouse* case itself. That case was sent back to the lower court and, on May 14, 1990, applying the Supreme Court's test, the lower court ruled in Hopkins' favor, awarded her $371,175 for lost earnings, and ordered Price Waterhouse to make her a partner. 52 Fair Empl. Prac. Cases 1275 (D.D.C. 1990).

Two lessons are clear for employers: (1) With *Price Waterhouse* on the books, it will be very difficult to justify any employment decision in which a factor such as race or gender has played a motivating part; and (2) Any employer who finds evidence that one of its managers or supervisors has been influenced by bias in recommending an employment action is now courting substantial liability if it implements the recommendation, unless the employer has solid proof that it also has a valid reason for which it would take the same action with respect to anyone else under the circumstances.

Against this background, one might expect that it would be employers, not plaintiffs' advocacy groups, who would be calling for legislative reversal of *Price Waterhouse*. Ironically, however, it is plaintiff's advocates who still demand more.

Section 5 of the Civil Rights Bill

The sponsors of the Civil Rights Act of 1990 propose, in Section 5 of their bill, to add a new subsection to Section 703 of Title VII, which defines unlawful employment practices. The new subsection would read as follows:

> (l) DISCRIMINATORY PRACTICE NEED NOT BE SOLE MOTIVATING FACTOR. — Except as otherwise provided by this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though such practice was also motivated by other factors.

Section 5 also would amend the enforcement provision of Title VII (Section 706(g)) to provide that reinstatement and backpay could not be awarded if the employer "establishes that it would have taken the same action in the absence of any discrimination." It would not, however, limit any other type of remedy a judge or jury could award under Title VII. Notably, the prospect of compensatory and punitive damages awards provided for in Section 8 of the bill would not be affected by the amendment to 706(g).

Practical Implications of Section 5

1. Potential Effect on Affirmative Action

Whether or not one regards the reversal of *Price Waterhouse* as a desirable goal, it is at least clear that the Civil Rights bill's sponsors intend that result. As noted above, however, Section 5 of bill may also have some serious implications that its sponsors do not intend — particularly for voluntary affirmative action.

Current law allows employers consciously to consider race or sex as a factor in selecting among candidates for hire or promotion pursuant to an affirmative action plan (AAP), provided certain conditions are met. Briefly, if the employer has identified a "manifest imbalance" in the representation of minorities or women in a "traditionally segregated job category," the employer may try to eliminate that imbalance by using "narrowly tailored" race- or sex-based preferences, as long all candidates are qualified and race or sex is treated merely as "one factor" or "a plus," not as the sole criterion for making selections. *See Johnson v. Transportation Authority of Santa Clara County*, 107 S. Ct. 1053 (1987); *United Steelworkers v. Weber*, 443 U.S. 1993 (1979).

A recent federal appeals court decision interprets this as meaning that a factor such as race or sex may be used as a "tie breaker" in choosing among qualified candidates to meet goals established under an AAP. *Conlin v. Blanchard*, 890 F.2d 811, 816-17 (6th Cir. 1989).

Under the language of the *Price Waterhouse*-reversal amendment, however, any such consideration of race or sex would appear to be illegal, regardless of its benign purpose. If race or sex were used as "one factor" or as a "tie breaker" in an employment selection, the employer could hardly deny race or sex was "a motivating factor for [an] employment practice" within the express language of the amendment. Moreover, since the amendment rules out any defense that the practice "was also motivated by other factors," the employer's legitimate affirmative action goals would be irrelevant.

Thus, nonminorities or males claiming to have lost out on job opportunities because of affirmative action goals could use the *Price Waterhouse*-reversal amendment as a tailor-made vehicle for challenging selections made to implement affirmative action goals. If they could show that race or sex was intentionally used as a factor in making selections, in the words of the amendment, an "unlawful employment practice [would be] established" regardless of any legitimate motivation the employer may have had.

A possible defense may be provided in Section 13 of the bill, which states that:

> Nothing in the amendments made by this Act shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are otherwise in accordance with the law.

It is, however, far from crystal clear that this "savings clause" applies to affirmative action plans that have been adopted voluntarily by employers, as opposed to affirmative action undertaken pursuant to a court order.

The word "court-ordered" in Section 13 plainly modifies "remedies," but it at least arguably also modifies the other terms that follow: "affirmative action" and "conciliation agreements." If so, then the Section 13 defense is limited to court-ordered affirmative action, and voluntary AAPs would remain vulnerable to the type of challenge described above.

Indeed, it would not be unreasonable to interpret the Section 13 in this limited manner, since court-ordered affirmative action has long been recognized as having a different, and in some respects, a stronger constitutional footing than voluntary affirmative action undertaken in the absence of any judicial finding of past discrimination warranting a court-ordered remedy. *See generally*, McDowell, *Affirmative Action After the Johnson Decision: Practical Guidance for Planning and Compliance* (NFSEP, 1987).

In short, Section 5 of the Civil Rights bill places affirmative action in jeopardy, and Section 13 cannot be relied upon to cure the problem.

2. Effects on Title VII Theory and Practice

a. A New Theory of Discrimination?

Conceptually, the Civil Rights bill's reversal of *Price Waterhouse* would wreak havoc on established Title VII principles. Currently, two basic theories of discrimination are recognized under Title VII — **disparate treatment** and **disparate impact**. Cases involving discriminatory motives have always been classified as disparate treatment cases. The essence of this type of discrimination is that an employer has treated someone differently than it otherwise would have because of that person's race, gender or other protected characteristic.

Where an employer can meet its burden of proof under *Price Waterhouse*, however, there has been no difference in treatment. There must be proof — indeed, proof by a "preponderance of the evidence" — that the employer in fact treated the individual no differently than it would have had race or sex not been a factor. Thus, by definition, there can be no finding of disparate treatment in such a case.

Enactment of Section 5, therefore, would compel the development of a new theory of discrimination under Title VII. The courts would have to devise a new label to cover situations where there has been no actual difference in treatment (i.e., no "disparate treatment") nor in effects (no "disparate impact"), but only an improper motive in the employer's mind.

b. Remedies for Violations Without Consequences

The implications of Section 5, however, are far more than just theoretical or conceptual. Its practical effect would be to make legal remedies available to persons who probably have suffered no loss of employment opportunity nor other injury as a consequence of an employer's improper consideration.

Proponents of the legislation argue that the proposed new language recited above (p. 6) must be added to Title VII in order to prevent employers from "escaping liability" for actions taken with discriminatory motives, and to assure that the "victims" in mixed motive cases will have a legal "remedy." After *Price Waterhouse*, however, there is only one way in which an employer who has acted with a discriminatory motive can "escape liability" — that is, by proving that the discriminatory consideration in its manager's mind did not affect the outcome of the employment transaction in question. Thus, *the bill would affect only situations in which it can be proved that a discriminatory motive really made no difference.*

By classifying the complainants in such cases as "victims" of discrimination, the proponents of the bill victimize the language. Persons who have suffered no different treatment because of an employer's improper motive — who are in exactly the same position they would have been in absent any discrimination — are not "victims," and any award made to such a person is not a "remedy" but a windfall.

"Victims" entitled to remedies under Title VII, if the bill passes, will include such person as:

- A minority job applicant who could not have been selected because he lacked the basic, job-related qualifications, but who could show that some management representative involved in the selection process had a bias against members of his race.
- A woman discharged for failing to meet uniformly-applied, objective standards of job performance, who could show that one of her supervisors, in discussing her performance with other managers, had made some remarks indicating stereotyped attitudes about women.

Each of the complainants in these examples, like the dishonest bank teller in the introduction to this paper, would be entitled under the Civil Rights Act of 1990, at a minimum, to a court injunction directing the employer to cease and desist from having such improper (albeit inconsequential) motives, and to pay attorney's fees and costs of the litigation.

Under Section 8 of the bill, moreover, the "victims" in each of our examples could also seek compensatory and punitive damages and demand a jury trial of their claims. Although common sense would seem to militate against imposing extraordinary monetary penalties for infractions that have no real world effects, the plaintiff's mere demand for these remedies would trigger a right to insist on a jury. And since common sense has not been a consistent hallmark of jury deliberations in employment cases, the possibility of large monetary awards cannot be ruled out. For that very reason, it is predictable that virtually all claims based on the *Price Waterhouse*-reversal amendment would, indeed, be brought before juries.

Prejudiced attitudes such as those of the managers in our examples are deplorable, of course, and whenever they result in a loss of an employment opportunity, or in harassment or adverse treatment of an individual on the job, they are properly recognized as unlawful under Title VII. No new legislation is necessary to assure that.

But when it can be proved that a plaintiff suffered no loss or harm as a result of an employer's conduct, to provide that person a legal "remedy" is neither appropriate nor a valid use of a court's time. As the Supreme Court put it in the *Mt. Healthy* case, when an employer's consideration of a "non-permissible reason" has not affected the outcome of an employment decision, it simply makes no sense to "place an employee in a better position than he would have occupied" in the absence of any improper factor. 429 U.S. at 286.

In short, to impose costly, potentially punitive legal remedies against employers based solely on mental biases that have had no real world consequences, as Section 5 of the bill would do, is purely Orwellian — it is, indeed, tantamount to banning "thought crime."

Conclusion

At a minimum, Section 5 of the Civil Rights bill needs to be examined carefully because, in its present form, it could have the unintended effect of handing nonminorities and males a devastating new weapon to use in attacking employers' voluntary affirmative action efforts.

The scrutiny should not stop with Section 5's potential effects on affirmative action, however. The implications of the bill's proposed new approach to cases involving "mixed motive" employment decisions also need to be understood.

As we have seen, the claim that the proposed amendment would restore Title VII law to its pre-1989 position misreads Justice Brennan's opinion in *Price Waterhouse* and casts aside the fundamental employment law principles on which that decision was based. In fact, the amendment would wreak havoc on Title VII principles and would require the creation of a new basic theory of discrimination.

The argument that the amendment is needed to provide remedies for victims of discrimination tortures the words "remedies" and "victims" and distorts the meaning of the Section 5 itself. In reality, the *only* persons who would gain legal remedies under the amendment that are not already available to them under existing law are persons who probably have *not* suffered any negative effects from employers' discriminatory motives because they would have received the same treatment for lawful reasons anyway.

In sum, the amendment is ill-conceived, unnecessary and inartfully drafted. Whatever action Congress decides to take with regard to other sections of the Civil Rights Act of 1990, it needs to rethink Section 5.

American
Psychological
Association

Advancing psychology as a science, a profession, and as a means of promoting human welfare

March 11, 1991

Honorable William D. Ford
House Committee on Education and Labor
United States House of Representatives
Washington, DC 20515-2215

Dear Congressman Ford:

Last week, the American Psychological Association presented testimony before the Committee which attempted to illustrate how the current definition of business necessity in H.R. 1 was overly restrictive, inconsistent with current scientific and professional standards, and would encourage further litigation. At that time, we proposed a definition of business necessity which, in the words of Mr. David Rose, former Chief of the Employment Section at the Equal Employment Opportunity Commission, would "restore the law to what it was before Wards Cove, and do so in a manner which would be in accord with the standards of the psychological profession and would be highly defensible."

I would like to take this opportunity to again emphasize the importance that a definition of business necessity be as precise as possible. This is essential not only to psychologists who design and conduct the employment practices that are at issue, but also to applicants, employers, and all other parties who operate within the employment selection arena. The APA definition will put meat on the bones of the definition embodied in Griggs, allowing lawyers on both sides to carefully evaluate the case short of litigation.

I ask that you consider these points and that such language be substituted during tomorrow's markup of H.R. 1. I also suggest that the argument presented by APA, and supported in other testimony on March 5, 1991 form the basis of report language that will be used in future litigation to test the degree employment practices represent important work behaviors. Please contact me if there is anything further APA can do to develop a Civil Rights Act that is responsive to scientific principles and the needs of minorities.

Sincerely,

Wayne J. Camara, Ph.D.
Director of Scientific Affairs

1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 955-7600

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AMERICAN BAR ASSOCIATION

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JOHN J. CURTIN, JR.
AMERICAN BAR CENTER
750 N LAKE SHORE DRIVE
CHICAGO, ILLINOIS 60611
TELEPHONE 312/988-5109
ABA/NET ABA2876

March 11, 1991

Dear Representative:

We understand that the Committee on Education and Labor soon will be marking up H.R. 1, the Civil Rights Act of 1991. Our Association last year adopted the attached resolution as official Association policy, and this year has made this issue one of our top legislative priorities. We are writing to urge you to support legislation such as H.R.1 which embodies these civil rights policy positions and to oppose amendments that may be offered during markup which would undermine these policy positions.

We are particularly concerned that deleterious amendments may be offered to modify the provisions in the bill regarding disparate impact and the award of compensatory and punitive damages. The American Bar Association supports both provisions of H.R. 1.

I. Disparate Impact (Wards Cove)

We believe H.R.1 properly restores the burden of proof in disparate impact cases to what it was prior to Wards Cove Packing v. Atonio, 109 S. Ct. 2115 (1989). The bill requires that after an employee proves through reliable and relevant statistics that a particular business practice or group of practices has resulted in the significant underrepresentation of minorities or women in an employer's workforce, the burden is on the employer to defend that practice by proving that it is required by business necessity.

Similarly, H.R.1 properly restores the standard required to prove business necessity to its pre-Wards Cove status by closely paraphrasing the business necessity test from Griggs v. Duke Power Company, 401 U.S. 424 (1971), the seminal case establishing disparate impact as a cause of action. If the employment practice involves selection, the practice or group of practices must bear a significant relationship to successful performance of the job. In cases that do not involve selection, the standard is less stringent: the practice or practices must bear a significant relationship to a significant business objective of the employer. Section 3 of H.R.1 forthrightly states that these sections are meant to codify the meaning of business necessity as used in Griggs.

Under H.R.1, employers do not have an impossible new standard to meet to assert business necessity as a defense. It is a standard with which both employers and the courts are familiar. We therefore believe that it will not lead, as years of Griggs did not lead, to the imposition of quotas by the business community.

II. Monetary Damages for Intentional Discrimination

H.R.1 corrects an anomaly in present civil rights laws that allows victims of intentional racial discrimination to receive compensatory and punitive damages (under 42 U.S.C. Section 1981) but does not authorize the same for victims of intentional gender or religious discrimination. It provides all victims of intentional employment discrimination the right to seek compensatory and punitive damages under Title VII of the Civil Rights Act of 1964. Punitive damages can be assessed only when an employer has acted with "malice or with reckless or callous indifference to the federally protected rights of others." The legislation unequivocally precludes the availability of damages and jury trials in disparate impact cases.

Last year, during debate in the Senate, an amendment was accepted that limited an award of punitive damages to $150,000 or to an amount equal to the compensatory damage award, whichever was greater. There is no cap on punitive damages in H.R.1.

The American Bar Association supports the damages provisions of H.R.1. We believe that the full availability of monetary damages for intentional employment discrimination under Title VII is essential. Without such remedies, many types of egregious employment discrimination involving minorities not covered by Section 1981 will continue to go unremedied. We find no justification for providing monetary damages in cases of intentional race discrimination under Section 1981 but not in cases involving other forms of intentional employment discrimination under Title VII. We likewise find no principled justification for limiting punitive damage awards under Title VII when they are not limited under Section 1981. The purpose of the damages provision is to afford the same remedies to all protected classes of individuals who have suffered employment discrimination, not to erect a slightly better, but nevertheless two-tiered system. We therefore strongly support the damages provisions in this bill and hope they will not be weakened during markup.

The Civil Rights Act of 1991 will reaffirm this nation's commitment to equal justice for all. While the Association has not addressed each and every provision of H.R.1, we support H.R.1 because it restores the effective enforcement of our national civil rights laws and affords the same anti-discrimination remedies to all protected classes. We therefore urge you to support H.R.1 and to oppose any amendments which would dilute the legal protections for minorities and women in the workplace which our Association believes are so essential to equal justice.

Sincerely,

John J Curtin Jr

John J. Curtin, Jr.

Attachment:
ABA Resolution

DAC:mj
0900b

AMERICAN BAR ASSOCIATION

RESOLUTION REGARDING TITLE VII AND §1981

ADOPTED FEBRUARY 1990

BE IT RESOLVED, that the American Bar Association supports federal legislation to restore Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981 to their status before the 1989 Supreme Court decisions in *Paterson v. McLean Credit Union*, *Wards Cove Packing Co. v. Atonio*, *Price Waterhouse v. Hopkins*, *Lorance v. AT&T Technologies, Inc.*, and *Martin v. Wilks.*

BE IT FURTHER RESOLVED, that the American Bar Association also supports federal legislation amending Title VII of the Civil Rights Act of 1964 to grant all protected classes the same rights to recover damages for employment discrimination which are enjoyed by victims of racial/ethnic discrimination under 42 U.S.C. §1981.

NCLR
NATIONAL COUNCIL OF LA RAZA
Raul Yzaguirre, President

National Office
810 First Street, N.E., Suite 300
Washington, D.C. 20002
Phone: (202) 289-1380
Fax: (202) 289-8173

TO: Interested Parties
FROM: Claire Gonzales,
Senior Civil Rights
Policy Analyst
DATE: March 4, 1991
RE: NCLR Hispanic Policy Initiatives
for the Civil Rights Act of 1991

I. SCOPE OF THE PROBLEM

A. Hispanics and Employment Discrimination

Hispanics in the U.S. labor force historically have been subjected to employment discrimination based on their national origin. Extensive empirical evidence indicates that, throughout the 1980s, Hispanics experienced high levels of employment discrimination. At least four independent studies have found that, even after controlling for factors known to affect employment and earnings (such as age, occupation, and educational attainment), Hispanics face serious differential treatment in the labor market.

A 1982 National Council of La Raza study, *The Effects of Discrimination on the Earnings of Hispanic Workers: Findings and Policy Implications*, found that 14% of the earnings gap between White males and Hispanic males and 29% of the gap between White females and Hispanic females is due to ethnicity alone, suggesting serious levels of employment discrimination. A 1982 U.S. Commission on Civil Rights report, *Unemployment and Underemployment Among Blacks, Hispanics and Women*, found that substantial disparities existed in unemployment and underemployment between Hispanics and Whites, even after controlling for disparities in education, training, and age. Since at every education, age, and training level Hispanics generally experienced more unemployment and underemployment than Whites, the Commission concluded that discrimination was a significant, if not precisely quantifiable, factor in these disparities.

Moreover, a Southern Illinois University study published in the *American Journal of Economics and Sociology* in 1987 found that in cities with large Hispanic populations, segregation and discrimination were responsible for 31.2% of the difference between Hispanic and White unemployment rates. A 1988 University of Colorado study found that in 1980 discrimination and labor market segmentation accounted for 18.1% of the difference between Hispanic male and White male earnings.

Finally, the National Council of La Raza (NCLR) and other Hispanic civil rights organizations continue to receive significant amounts of anecdotal evidence of severe employment discrimination. Each month, NCLR receives numerous reports of discriminatory treatment in employment from Hispanic individuals who do not know where else to turn. NCLR affiliates, which are community-based organizations that serve Hispanics, also report a constant flow of employment discrimination complaints from their constituents.

While employment discrimination is a pervasive experience for many Hispanics, few of them have access to the government systems in place to remedy such discrimination. In particular, the Hispanic community is under-served by the Equal Employment Opportunity Commission (EEOC), coordinator of the federal government's civil rights enforcement effort in the area of employment.

B. Failure of Federal Civil Rights Enforcement Efforts to Serve Hispanics

Despite this evidence of continuing employment discrimination against Hispanics, there is undeniable evidence that Hispanics are not benefiting equitably from federal civil rights enforcement efforts. In the EEOC's own 1983 report, Analysis of the EEOC's Services to Hispanics in the United States (1983 Hispanic Charge Study), an EEOC-appointed task force found that the EEOC was not providing equivalent service to all protected group members, particularly Hispanics.

The 1983 Hispanic Charge Study is composed of an external study and an internal study. In the external study, 120 representatives of the Hispanic community testified at six hearings that Hispanics were either unaware of the EEOC's enforcement authority or had a negative perception of the agency. The Hispanic witnesses expressed a general lack of trust for the EEOC and its service to Hispanics. The internal study, in which the EEOC conducted a statistical analysis of the services the EEOC had rendered to the Hispanic community, found that (i) the EEOC had a record of hiring very few Hispanics, particularly in policy positions; (ii) the EEOC did not actively investigate Hispanic charges and it had chosen not to litigate Hispanic claims; and (iii) the EEOC had made little effort to improve its presence or reputation in the Hispanic community.

Specifically, the 1983 study found that:

- In the four year period from 1980 through 1983, lawsuits alleging discrimination based upon national origin (Hispanic) were only 27, or 2.8%, of the total 935 suits.
- Of the EEOC's reported "significant litigation" for the 10 year period from 1972 to 1982, there were no cases listed in which:
    - the issue of national origin discrimination was litigated on behalf of Hispanics as the sole or primary issue;
    - Hispanics were the primary class being represented; or
    - Hispanics were the only individuals being represented in a systemic or "pattern or practice" case.

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- As of May 1, 1983, only 2.4% of the General Counsel's total 536 cases in litigation involved national origin (Hispanic) discrimination.

The internal study also revealed ample evidence of disparate treatment of Hispanic charges, based upon a finding of extremely high administrative closure rates for Hispanic charges. In 1980, 5310, or 84%, of the total 6327 national origin (Hispanic) charges filed with the EEOC were administratively closed without any remedy to the charging party. Similarly in 1982, 3739, or 79.5%, of the 4706 Hispanic charges filed were administratively closed without any remedy to the charging party.

The internal study concluded with a finding that the quality of EEOC investigations on behalf of Hispanics was extremely poor and that the EEOC had allocated inadequate resources to service the Hispanic community. It also found that there was little or no communication between EEOC and community-based Hispanic organizations. As a result, the EEOC had either very little presence or a negative presence in the Hispanic community.

The EEOC Task Force identified action necessary to address the problem of the EEOC's inferior service to Hispanics, which was uncovered by the report. Among many other things, the Task Force recommended that (i) the entire charge processing and investigation system should be revamped so that 80% of all Hispanic charges would not be summarily dismissed without investigation and/or remedy; (ii) the General Counsel must aggressively pursue litigation on behalf of Hispanics; and (iii) there must be vigorous and widespread outreach to the Hispanic community through the use of community-based organizations.

C. No Evidence of Improvement in EEOC's Service to Hispanics

Recent evidence indicates that little or no improvement has been made by the EEOC since the 1983 Hispanic Charge study. In the EEOC's 20th Annual Report for FY 1985, only three of the 125 reported "noteworthy resolutions" secured by the EEOC's district offices during FY 1985 mention national origin as a basis for the charge. Of those three national origin cases, only one of those was based solely on national origin (Hispanic) discrimination. Additionally, the EEOC's 20th Annual Report reveals that while the EEOC filed a total of 286 lawsuits in FY 1985, only 11 of those, or 3.8%, were based on a charge of national origin (Hispanic) discrimination.

The EEOC's Combined Annual Report for Fiscal Years 1986, 1987, and 1988 also fails to provide any evidence of improved service to Hispanics. The combined report's summary of "noteworthy resolutions secured by the EEOC" for each of the three fiscal years shows that:

- For FY 1986, of the total 63 cases reported, only 3, or 4.8%, were based on a claim of national origin (Hispanic) discrimination.
- For FY 1987, of the total 316 cases reported, only 5, or 1.6%, were for national origin (Hispanic) claims.

- For FY 1988, of the total 368 cases reported, only 7, or 1.9%, were for national origin (Hispanic) claims.

The report also lists a total of 1296 "substantive" lawsuits filed by the EEOC in fiscal years 1986, 1987, and 1988. Of those 1296, only 64, or 4.9% are listed as having national origin as at least one basis for the charge. (The information is disaggregated by type of national origin; therefore, it is unclear how many, if any, are specifically Hispanic claims.)

II. REASONS FOR EEOC'S FAILURE TO SERVE HISPANICS

Many interrelated factors account for the failure of Hispanics to benefit equitably from federal civil rights enforcement. Due to the failure of the EEOC to implement an effective outreach and education program, Hispanics generally have little knowledge about their own rights and about what constitutes illegal employment discrimination. Lack of outreach and education has also resulted in Hispanics having little or no knowledge of the various federal civil rights enforcement agencies, particularly the EEOC, and their powers. Furthermore, because federal enforcement institutions have long been inattentive to their concerns, Hispanics do not trust these institutions.

Hispanics also suffer from a lack of access to the enforcement system due, in part, to the absence of a well established network of community organizations to counsel and to provide assistance to them. This problem is exacerbated by a profound lack of legal services available to the Hispanic community.

Finally, all federal enforcement agencies, but particularly the EEOC, have failed to focus on the special needs of Hispanics. This is best seen in the lack of adequate bilingual/bicultural capabilities currently found in enforcement agencies even though the Hispanic community is the fastest growing minority in the country.

III. NCLR'S POSITIONS

NCLR supports enactment of the Civil Rights Act of 1991 to rectify the damage done by six 1989 Supreme Court decisions to the two most important federal civil rights laws relating to employment discrimination - Title VII of the Civil Rights Act of 1964 and 42 U.S.C. Section 1981. As a result of the Court's actions, it is now much harder to prove employment discrimination and the available remedies for employment discrimination have been severely limited. The Civil Rights Act of 1991 is, therefore, necessary to recover lost ground in the struggle for equal employment opportunities.

In addition, NCLR has prepared a three-point proposal to improve the responsiveness of the federal civil rights enforcement system to Hispanics. The proposal will:

- Increase Outreach

An aggressive education and outreach program conducted by the EEOC is necessary if Hispanics are ever to benefit significantly from the current enforcement scheme. NCLR, therefore, proposes the creation of a modest public education program targeted to newly-covered and historically "under-served" groups, such as Hispanics and the disabled.

- Encourage Affirmative Investigations

The EEOC must be directed to fulfill its existing statutory mandate to act on its own to uncover and to stop widespread discrimination, particularly with regard to cases involving "under-served" groups. The EEOC's current two part, independent system for investigating and litigating systemic or "pattern or practice" cases should first be reorganised to allow for a strong coordinated program. Once revamped, the coordinated program must receive the funding and other resources necessary to carry out its mandate.

- Establish "Testing" Programs

NCLR proposes the creation of a new employment discrimination "testing" program to be implemented and administered by the EEOC. NCLR has long believed that the use of testing in the area of employment discrimination would be an appropriate and effective method of combatting illegal discrimination. NCLR is particularly encouraged by the recent announcement by EEOC Chairman Evan Kemp that the EEOC will accept employment discrimination charges brought by "testers." Additionally, the GAO's March 1990 report on the effect of IRCA's employer sanctions provisions indicates that a valid methodology for testing in the employment sphere is possible.

Given the success of the fair housing testing program administered by the Department of Housing and Urban Development (HUD), the most effective way of conducting a testing program seems to be through community-based organisations that are familiar with and easily accessible to the people intended to be served. Following the HUD model, the proposed employment discrimination testing enforcement program would use private local organizations to assist in the receipt and processing of complaints; document complaints through testing and other investigative work; disseminate information about fair employment practices enforcement systems to local communities; and conduct employment testing studies (unrelated to individual complaints) to uncover systemic discriminatory practices. NCLR believes that such a testing program would foster a positive and mutually beneficial relationship between the EEOC and the Hispanic community.

IV. CONCLUSION

NCLR believes that its three-part civil rights proposal is very modest in its terms. The proposal does not seek to change existing remedies or standards, nor does it expand coverage of existing laws. NCLR is merely proposing to use accepted and proven means for achieving the generally accepted goal of fair and equal protection of Hispanics and other newly-covered or "under-served" groups under Title VII.

For more information, please contact Claire Gonzales, NCLR Senior Civil Rights Policy Analyst, at (202)289-1380.

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JULIAN C. DIXON
28th District, California

Committee:
APPROPRIATIONS

Chairman,
SUBCOMMITTEE ON THE
DISTRICT OF COLUMBIA

Member,
SUBCOMMITTEE ON
DEFENSE

Congress of the United States
House of Representatives
Washington, DC 20515

2400 Rayburn House Office Building
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ANDREA TRACY HOLMES
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PATRICIA MILLER
ADMINISTRATIVE ASSISTANT

March 14, 1991

Honorable William D. Ford
Chairman
Committee on Education and Labor
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

As you are probably aware, The Washington Post published an article on February 12, 1991, detailing how a public relations and lobbying firm took credit for the defeat of the Civil Rights Act of 1990. The firm, Robinson, Lake, Lerer and Montgomery, also attributed the presidential veto of the Civil Rights bill to their work with the White House, and noted that "when the negotiators strayed too far, we let reporters know it, which on at least one occasion resulted in staving off a potentially devastating administration retreat."

The Robinson strategy was to cast the Civil Rights bill in a single issue format. They proudly proclaimed in their report to the coalition opposed to the bill, that "every day, we reinforced the message that reasonable people could find this to be a quota bill."

Concerned about the inaccurate focus and incorrect defining of what the Civil Rights Act is all about, I sent a letter to The Washington Post. In my letter (which I have enclosed for your information), I expressed my exception to the manner in which Robinson attempted to portray the Civil Rights Act as a quota bill - and not as a bill designed to overturn very harmful U.S. Supreme Court decisions on equal employment opportunity and affirmative action.

A quite interesting and revealing response from Robinson's board chairman, Mr. James Lake, was sent to my attention, obviously in response to my Washington Post letter. Mr. Lake admits to the "inappropriate...tone and emphasis" of his firm's report.

For your further review, I have enclosed copies of The Washington Post article, and Robinson's report to the Fair Employment Coalition, which hired Robinson to act on their behalf in opposing the Civil Rights bill.

It is my hope that this information may prove to be of value to our collective efforts in obtaining a Civil Rights Act for 1991.

Sincerely,

JULIAN C. DIXON
Member of Congress

JCD:jws

Enclosures

Robinson, Lake, Lerer & Montgomery

Robinson, Lake, Lerer & Montgomery
1667 K Street, N.W.
Suite 900
Washington, DC 20006
202-457-9270

James H. Lake
Chairman

March 5, 1991

Sheila: copy to Jean

The Honorable Julian Dixon
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Dixon:

Your letter to the editor of the Washington Post dated March 1, 1991 regarding Robinson, Lake, Lerer and Montgomery raises several important issues and I felt it was necessary to respond to your concerns.

I want to make it clear that we recognize that the memorandum to our client referred to in the February 12th Washington Post article was totally inappropriate. It also did not reflect the scope of our work on behalf of the Fair Employment Coalition or our client's objectives regarding the Civil Rights Act of 1990.

Our firm was retained in May 1990 by the Fair Employment Coalition, an organization of major corporations and trade associations such as the National Association of Manufacturers, the Chamber of Commerce of the USA, the National Federation of Independent Business, the Labor Policy Association, and others.

The Fair Employment Coalition represents many corporations with a record of commitment to affirmative action and the elimination of discrimination in the workplace. In fact, it was these very companies and organizations that split with the Reagan Administration in 1985 when Ed Meese and William Bradford Reynolds attempted to overturn the Executive Order on Affirmative Action.

These companies strongly favored passage of civil rights legislation that would correct workplace discrimination and help overturn the six Supreme Court decisions of 1989. They were concerned, however, about specific language in the proposed Civil Rights Act of 1990 which, it was felt, would adversely affect the business community. Our firm was hired to assist in the effort to enact compromise legislation that would avoid the unintended consequences the companies felt were contained in the legislation as originally introduces.

The companies comprising the Fair Employment Coalition believed that a reasonable compromise could be effected. To this end, for example, we worked on behalf of our client to point out the advantages of legislation introduced separately by Senator Nancy Kassebaum and Representative John LaFalce. Unfortunately, these and other compromises were not enacted.

Only after it became clear that a compromise addressing the legitimate concerns of the business community was not likely to take place in the 101st Congress did our clients reluctantly take a position opposing the legislation.

After the 101st Congress adjourned, and after the 1990 midterm elections had ended, the Fair Employment Coalition asked us to report to them on our efforts. The tone and emphasis of this report were clearly inappropriate and did not reflect our client's commitment to the primary goals embodied in the civil rights legislation.

Again, our client's main objective was, and remains, legislation that rectifies the problems created by the 1989 Supreme Court decisions in a manner that does not adversely affect the business community. Any implication to the contrary in our memorandum to the Fair Employment Coalition was unintentional and did not reflect the views of our client or the work of our firm.

Robinson, Lake Lerer and Montgomery is a bipartisan communications firm that represents a variety of corporations and nonprofit organizations. Our staff includes individuals who are Democrats and Republicans, liberals and conservatives. In this case, we worked with a client that acted in good faith to address what is considered to be flaws in an otherwise needed civil rights bill.

Our firm is not in the business of producing "Madison Avenue-style hoopla" or" public relations hype," but makes a serious effort to assist our clients in identifying and achieving realistic and attainable communications goals.

Should you have any additional questions about our work on behalf of the Fair Employment Coalition, I would be more than happy to discuss the situation with you more fully.

Sincerely,

Jim Lake

James H. Lake

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FRIDAY, MARCH 1, 1991

The Washington Post

AN INDEPENDENT NEWSPAPER

Reintroducing the Civil Rights Act

In The Post's Feb. 12 article "Firm Claims Credit for Civil Rights Veto," the public relations firm Robinson, Lake, Lerer and Montgomery takes credit for organizing a major campaign that it claims caused the presidential veto of the Civil Rights Act of 1990. The coalition organized in opposition to the bill, the print media, administration and others all deny being influenced by Robinson and company. Yet this public relations firm was in on the action to defeat the bill, and hypocritically so.

The firm used the infamous "big lie" technique by calling the civil rights measure a "quota bill." Any reasonable, balanced reading of the bill would have indicated that this was far from the case. In fact, significant changes from the original bill clearly articulated that nothing in the legislation "shall be construed to require an employer to adopt hiring or promotion quotas."

The purpose of the 1990 act was to overturn a series of U.S. Supreme Court decisions on affirmative action. The court's decisions have made it harder to prove job discrimination, easier to challenge affirmative action plans and have sharply reduced remedies available to victims of discrimination. The basic standards of fairness and equal justice for racial and ethnic minorities and women in the workplace are being undermined.

With the reintroduction this January of the Civil Rights Act of 1991 (H.R. 1), this society can pursue its commitment, as originally accomplished through the courts, Congress and a consensus of American people, to equal and fair employment opportunities for all citizens. The opportunities presented in this bill will help make this nation more moral by providing the kind of leadership that reaffirms our commitment to fairness, racial justice and equal opportunity for all Americans.

Employment discrimination is not a single-issue matter. It has a negative impact on the victim's economic life and affects how he or she will provide for personal as well as family needs. Its cost to our society is enormous.

It is not often that an issue of nationwide proportion and substance, impacting on the lives of millions of citizens, is brought to its knees by public relations hype and Madison Avenue-style hoopla. Discrimination in the workplace is intolerable and should be mandated out of existence.

JULIAN C. DIXON
U.S. Representative (D-Calif.)
Washington

A REPORT TO THE FAIR EMPLOYMENT COALITION

ROBINSON, LAKE, LERER & MONTGOMERY

November 28, 1990

This report is for the purpose of recapping the communications effort undertaken by Robinson, Lake, Lerer & Montgomery on behalf of the Fair Employment Coalition throughout the battle over the Civil Rights Act of 1990.

We believe our efforts helped the Fair Employment Coalition have an impact upon the political environment by reinforcing the legitimate reasons for President Bush's eventual veto of the Civil Rights bill. On behalf of the Fair Employment Coalition, we:

- *Helped assemble a first-rate communications operation;*
- *Developed and honed the messages, themes and arguments Business utilized, and put into place the vehicles for delivering those messages;*
- *Positioned the Fair Employment Coalition as the business group opposed to the Kennedy-Hawkins bill as introduced;*
- *Wrote and had published opinion-editorial material;*
- *Developed materials for delivery to editorial boards;*
- *Arranged briefings of reporters and meetings with key editorial boards;*
- *Became the "speakers bureau" for reporters and/or television talk shows seeking business spokespersons;*
- *Developed radio advertisements aired in key Congressional districts;*
- *Served as strategists, communications counsel and "backgrounders" in dealings between the Fair Employment Coalition and members of the media.*

We entered the process late -- the bill had already come out of committee -- and thus engaged in what was a defensive effort to stop the bill. Having entered the process when most analysts were predicting the bill's eventually becoming law, our job was to ensure this didn't happen. This is how we assisted in that accomplishment.

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We began work for the Fair Employment Coalition in the middle of May, 1990. At that time, the message emanating from the White House was that while the President had some reservations about it, he very much wanted to sign the Civil Rights Act. At the same time, the Civil Rights leadership and the bill's authors were openly predicting a "firestorm" if he didn't sign it. Up to this point, Business had been so gun-shy, the White House was saying privately that they simply could not sustain opposition to the bill, and therefore they probably were not even going to try.

On the same day in May that the President met with Civil Rights leaders in the Oval Office, Marlin Fitzwater announced that President Bush's signing the bill was an all but accomplished fact.

The Fair Employment Coalition, however, subsequently met with Boyden Grey and John Sununu, assured them that there were members of the business community who would speak out, and urged them to take seriously both the quotas and damages provisions of the bill.

At about this time, we (Jim Lake and John Buckley) met with White House officials to let them know of our involvement with the Fair Employment Coalition, and that we could be of assistance in helping shape arguments to support the President's opposition, and if necessary, eventual veto. We were encouraged to help shape the intellectual and political environment to prevent the bill's passage, and failing that, to make better understood the President's reasons for issuing a veto.

Fortunately, on May 18, the President announced his conditions for signing such a bill, and by so doing, he gave us all a great deal of material to work with.

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Our first task was to develop up-to-date media lists to include national reporters based in Washington, regional reporters from key states who were based in Washington, talk show hosts and so-called guest grabbers, editorialists, columnists, conservative activists, and editorial board members, business editors and political reporters from newspapers in key states and Congressional districts from around the country.

We began mailing out collections of newspaper clippings to illustrate the steady drum beat against the bill, and we helped the Coalition package some of its materials into the format that busy general-interest reporters would need in order to get a sense of the substance behind calling this a "quota bill."

When there was press interest in the quota aspect of the bill, we made sure we mailed out information about damages; when the emphasis in the media shifted to damages, we were certain to bring up quotas. Through this effort, we were able to keep both of the issues critical to Business viewed as co-concerns, not as either/or negotiating points.

We drafted over a dozen separate op-ed pieces, helped arrange for people to sign them, and attempted with some success to have them published in both national and local newspapers. Additionally, we crafted generic op-ed pieces to be disseminated at the "grass roots" by various organizations within the Fair Employment Coalition. We found that even those newspapers which did not print the op-eds we sent them often wrote subsequent editorials reflecting the information and arguments we presented them with.

We began working with the key reporters who were covering the issue to let them know that if they wanted information from the organization representing Business, the Fair Employment Coalition was whom they ought to go to. It's fair to say that if we had not done this, the only quoted opposition to the bill would have been from people and organizations whose agenda did not much overlap with ours, and with whom an association would be negative.

* * *

As we entered summer, we had in place a mechanism to put out in a timely fashion news releases, analysis, and reprints of important clips. We had key editorialists and columnists from such disparate publications as The New Republic and the Wall Street Journal relying on the Fair Employment Coalition for analyses of whatever "compromise language" was put forth by the bill's proponents.

We worked with the White House, but when the negotiators strayed too far, we let reporters know it, which on at least one occasion resulted in staving off a potentially devastating Administration retreat.

When it became clear which Members of Congress were true swing votes, we targeted opinion-editorial materials to their local newspapers. We wrote material that was used by business groups in mailings to their memberships. We ran a speakers bureau which sent Coalition members to meet with editorial boards of key newspapers. Each of these visits resulted in either significantly favorable editorials, or at least mitigation of previously hard-line stances in favor of the bill.

We also arranged for press luncheons/breakfasts with key reporters to introduce them to the Fair Employment Coalition. This helped establish the Coalition in reporters eyes as a reliable player with whom they should deal.

Prior to the votes in late July, we were the principal mechanism by which the alternative bills (Kassebaum, LaFalce) became known to the media. Together with our coalition partners, we helped guide reporters through the thickets of understanding the differences between the various drafts, and how both Kassebaum and LaFalce would accomplish what the Kennedy-Hawkins proponents claimed they were attempting, only without the quota problem contained in K-H.

When LaFalce and Kassebaum were both unable to get floor votes and it was clear that Kennedy-Hawkins was headed for a veto, we wrote and mailed to our entire press list an analysis of the debate thus far. The Fair Employment Coalition's "A Brief History of Our Times: The Civil Rights Act of 1990" was credited by many reporters with being an objective analysis of events to date that was both a credible defense of Business and a rational definition of the political agenda motivating various of the bill's proponents.

We put into perspective (both in this piece and throughout the process) what the plaintiff attorneys were attempting to pull off for themselves. And, since the other side consistently hid behind the notion that all they were doing was "restoring Griggs," we pointed out the fallacy in that argument.

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We must be clear that it was George Bush calling the bill a "quota bill" that established it as such, and if he had not done so, we would have been hard pressed to make that case. Nonetheless, "A Brief History of Our Times: The Civil Rights Act of 1990" was a serious effort by Business to change the terms of the debate from, Why does Business like discrimination? to, Why don't the Civil Rights organizations work with us, instead of trying to demonize us? By pointing out precisely how much Business had done in terms of affirmative action and establishment of EEOC policies, it took some of the credibility away from those who would make Business out to be "the enemy."

In the weeks between the Congressional recess and the sustaining of the President's veto, we provided the media with mailings ranging from the serious to the somewhat whimsical, the purpose being to keep our analyses of the situation on their radar screens. With cover sheets affixed to key editorials or columns we thought they ought to see, we made certain that anything that backed up our case was made available to reporters. The way we recycled material from publications around the country conveyed the impression that, for every proponent of the bill calling George Bush a racist, there were at least a few thoughtful commentators eviscerating such arguments.

We made certain that in the weeks before the final vote and subsequent veto, any reporters covering this bill knew the arguments against it. Every day, we reinforced the message that reasonable people could find this to be a "quota bill."

Throughout the process, we helped establish the tone in response to events. Fair Employment Coalition spokespersons dealing with the news media worked closely with us to find out what the media were working on, and what were the best arguments to use with them. We served the Coalition as media strategists and eyes and ears.

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In October, as the Mid-term election began to heat up, we produced radio spots and subsequently bought time on stations throughout key Congressional districts. The ads pointedly raised questions about whether some Members of Congress were in favor of quotas. (Suffice to say, we were far less heavy-handed and controversial than Senator Helms was.) These radio spots did not make any of the members we targeted change their minds, but we believe they had an effect on other members of Congress who may have been in danger of backsliding and opposing the President when it came time to sustain the veto.

When the veto came, we made no attempt to turn back the tide of hysteria that followed. Since the veto occurred so near to the election, most reporters who had not covered the substantive issues played it purely in terms of politics -- which was to the benefit of the "aggrieved party" -- in this case, minorities and women. As network television was giving prominent Democrats a free shot at comparing the President to David Duke, it made sense to keep a low profile.

In the wake of the election, now that it's clear that not only did the veto not cost the President's party, but that support for the bill may have cost the Democrats a U.S. Senate seat from North Carolina, there is renewed interest in this issue. Reporters are once again coming to the Fair Employment Coalition as the focal point for Business's efforts to prevent a new version of the Civil Rights Act from becoming law.

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To this end, there is much unfinished work. In the coming year, we need to build upon the foundation we laid in 1990. The Fair Employment Coalition was established as a reasonable, straight-shooting player in this battle. Rather than start from scratch, we believe this communications entity should be kept in operation.

By starting early, we can attempt to convert what was a defensive strategy into offense, the goal being to promote a genuine Civil Rights bill without the negative components of quotas and damages. We can make a positive impression in the campaign of ideas, and not simply attempt to make certain we prevent a bad bill from becoming law.

The Fair Employment Coalition's communications operation should live on into the next Congress. We know the Civil Rights groups and Kennedy-Hawkins proponents will be back. Our goal in the next year ought not simply be to beat them, but to provide a positive alternative to those who believe you must promote racial quotas in order to redress discrimination.

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Firm Claims Credit for Civil Rights Veto

Principals in Fight Over Legislation Remember Events Differently

By Gary Lee
Washington Post Staff Writer

Last October President Bush vetoed the Civil Rights Act of 1990, pleasing conservatives with his denunciation of "the destructive force of quotas" he said it would introduce in the workplace.

The president's language and the veto itself were no coincidence—at least that's what a prominent Washington public relations and lobbying firm wants a client to believe.

In a memo obtained by The Washington Post, the firm of Robinson, Lake, Lerer & Montgomery goes into extensive detail to describe how it orchestrated a campaign against the bill on behalf a group of business organizations known as the Fair Employment Coalition, shaped the debate over the bill and played a big role at one point in preventing the White House from signing it.

The memo goes on to argue that there is "much unfinished work" on the issue in the current session of Congress and suggests, not surprisingly, that Robinson, Lake is the firm to do it.

Among its accomplishments, the firm claims, is persuading such publications as The New Republic to write editorials against the bill. But if Martin Peretz, The New Republic's editor, was swayed by Robinson, Lake or the coalition, it was news to him. Peretz said he "had never even heard of" the firm or its client. Nor does the White House attribute any importance to the firm in developing the administration's position.

Even a spokesman for the coalition raised a question about Robinson, Lake's claims. "We had dubbed this as a quotas bill long before they came into the picture," said Nancy Fulco of the U.S. Chamber of Commerce, a member of the coalition. "But they did help sharpen

"We were encouraged to help shape the intellectual and political environment to prevent the bill's passage, and failing that, to make better understood the president's reasons for vetoing it," the memo said.

While leaders of the coalition did meet with White House officials several times to discuss the bill, Buckley acknowledged in a recent interview that the meetings were not held at the group's initiative, but at the request of the White House.

A White House spokesman said that members of the coalition "made their views on the civil rights issue clear to the administration," but added that "we have no way of assessing what their influence was on the debate or the president's feelings on the bill. We were meeting with a lot of groups, and it's hard to sift out the importance of just one."

A critical part of its strategy, according to Robinson, Lake, was encouraging stories in the news media

"We drafted over a dozen op-ed pieces, helped arrange for people to sign them, and attempted to have them published in both national and local newspapers," the memo said. "We had key editorialists and columnists from such disparate publications as The New Republic and the Wall Street Journal relying on the Fair Employment Coalition for analyses of whatever compromise language was put forward by the bill's proponents."

L. Gordon Crovitz, the Journal's deputy editorial page editor, said he was not influenced by Robinson, Lake or its client. "We make up our own minds on editorial positions we take," he said. "We have written editorials against quotas for the past 20 years."

Civil rights groups that supported the bill were sharply critical of the tactics employed by Robinson, Lake as described in the memo. "They distorted the issue by casting it in terms of one single emotional issue," said Melanne Verveer of People For the American Way.

But Buckley defended his firm's approach. "It was our job to see that business's voice was heard on this issue," he said. "And I must say we were very successful."

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State of West Virginia

Legislative Resolution

HOUSE RESOLUTION NO. 18

(By Delegate Meadows)

URGING THE PRESIDENT TO SUPPORT CIVIL RIGHT INITIATIVES
TO HELP MINORITIES AND WOMEN IN THIS
COUNTRY REACH THEIR FULL POTENTIAL.

WHEREAS, There is a disproportionate number of blacks and other minorities servicing our nation in the Persian Gulf. Although they are serving with pride and dedication, their presence in such numbers is confusing to many here at home; and

WHEREAS, President Bush should do more for the rights of blacks and other minorities. While asking minorities to fight for freedom in a far-off distant land, it should also include the President fighting for freedom here at home; and

WHEREAS, President Bush vetoed the Civil Rights Act of 1990; and

WHEREAS, Congressional findings specified that a "series of recent decisions addressing employment discrimination under Federal law, the Supreme Court cut back drastically on the scope and effectiveness of civil rights protections" which are needed now for minority people; and

WHEREAS, "Existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination"; and

WHEREAS, While we support the war effort in the Gulf, it should not be an excuse for ignoring the rights of minority people here at home; therefore, be it

Resolved by the House of Delegates:

That the President and members of Congress examine civil rights and take action to end the institutional racism that still occurs; and, be it

Further resolved, That the Clerk of this body forward copies of this resolution to the President, the six members of Congress from West Virginia and to NAACP of West Virginia.

Adopted by the House of Delegates February 23, 1991.

Speaker of the House of Delegates

Donald L. Kopp
Clerk of the House of Delegates

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